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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 15-CR-637 (KAM)  
Plaintiff, :  
-against- : United States Courthouse  
MARTIN SHKRELI, : Brooklyn, New York  
Defendant. : Wednesday, July 26, 2017  
-----X : 9:00 a.m.

TRANSCRIPT OF CRIMINAL CAUSE FOR TRIAL  
BEFORE THE HONORABLE KIYO A. MATSUMOTO  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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Proceedings recorded by Stenographic machine shorthand,  
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1 (In open court; outside the presence of the jury.)

2 THE COURT: All right. All counsel and parties  
3 are present.

4 I have just been handed a stipulation and waiver  
5 of jury trial in the event that Mr. Shkreli is convicted and  
6 the forfeiture phase of the trial then must be continued.

7 My understanding originally was that the defendant  
8 wished to invoke his right to have a jury determine the  
9 forfeiture issues if he is convicted and the stipulation  
10 appears to state that Mr. Shkreli waived his right to a jury  
11 trial as to the forfeiture count.

12 So I just want to make sure, sir, that you do  
13 understand your right to a jury trial in the event you are  
14 convicted and the case proceeds to forfeiture; do you  
15 understand that, sir?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: And were you able to discuss that  
18 fully with your lawyer and understand that you would have a  
19 right to have the jury determine the forfeiture issues?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: And do you wish to waive your right to  
22 have a jury trial decide those issues?

23 THE DEFENDANT: Yes, I do, Your Honor.

24 THE COURT: Has anyone threatened you or coerced  
25 you to waive this right?

1 THE DEFENDANT: No, Your Honor.

2 THE COURT: All right, sir. I will then execute  
3 the stipulation and we will determine, if necessary, the  
4 forfeiture issues.

5 MR. BRAFMAN: Your Honor, I explained to  
6 Mr. Shkreli, obviously, this only becomes an issue if, in  
7 fact, he's convicted.

8 THE COURT: Exactly, yes.

9 And I was just trying to recall whether  
10 the Government sought forfeiture on all counts or just  
11 certain counts?

12 MS. KEDESHIAN: All counts, Your Honor.

13 THE COURT: All counts?

14 MS. KEDESHIAN: All counts.

15 THE COURT: All right.

16 Okay. Now, we posted the draft jury charges last  
17 evening, I think maybe just before 8:00. I am sorry it took  
18 longer than we thought. We just had -- you can see by the  
19 volume of the instructions that we had to make sure that  
20 everything was in order.

21 I think what I am going to propose to do is to go  
22 through each instruction that a party identified as an  
23 instruction which they wish to be heard.

24 MR. BRAFMAN: Judge, it's not on, Your Honor.

25 THE COURT: You cannot hear me?

1 MR. BRAFMAN: We're having trouble hearing you,  
2 Your Honor.

3 MS. KASULIS: Your Honor, can you do the Rule 29  
4 motion and then the housekeeping with the exhibits?

5 THE COURT: Yes, we will. We will start with  
6 that, but I just wanted to make sure that we understood the  
7 procedures for going through these instructions.

8 There were a couple of matters that we were going  
9 to resolve. One was the exhibits. I understand the  
10 Government has withdrawn the admission of five of the  
11 exhibits, and I do not know whether the parties have --

12 MR. SRINIVASAN: That's right.

13 THE COURT: -- a dispute about whether the  
14 Government had sufficiently connected these exhibits to the  
15 trial evidence.

16 I am happy to hear exhibit by exhibit whether the  
17 defense has objections or wants to be heard further.

18 MR. AGNIFILO: Yes.

19 THE COURT: Let's start with the Government  
20 Exhibit 105-7. This is an e-mail between Mr. Blanton's  
21 assistant and Mr. Shkreli regarding a telephone call.

22 MR. AGNIFILO: Right. This is the e-mail  
23 regarding tooth extractions?

24 THE COURT: Yes.

25 MR. AGNIFILO: Okay. Right, right.

1 I don't know at the end of the day that there's  
2 any indication that this didn't happen.

3 (Pause in proceedings.)

4 MR. AGNIFILO: Our position is that the e-mail is  
5 essentially irrelevant. I mean, there's been no pattern  
6 shown that using any tooth extractions to put off  
7 Mr. Blanton or anyone else. So I don't really know what  
8 relevance the e-mail has. So we object to it.

9 THE COURT: Mr. Srinivasan?

10 MR. SRINIVASAN: Yes, just briefly, Your Honor.

11 I think this evidence was offered just as part of  
12 the series of e-mails received with different investors  
13 about what we would argue is a pattern of delay, especially  
14 once the redemption process starts with these investors.

15 As to this particular e-mail, there was extensive  
16 cross-examination about it where the defense asked  
17 Mr. Blanton about the tooth extraction, whether it was  
18 possible -- it was brought up multiple times. So I think  
19 there's an adequate basis for it to be admitted given all  
20 the totality of the evidence in the case.

21 MR. AGNIFILO: Your Honor, if I recall, I think it  
22 was Mr. Richardson who said that he was personally aware of  
23 the fact that Mr. Shkreli had a number -- I think I asked  
24 Mr. Richardson on cross, you remember, that he got a number  
25 of tooth extractions and my recollection of his answer, I

1 don't recall that there was a tooth extraction, but I  
2 remember there was a number of different dental procedures  
3 that Mr. Shkreli was undergoing.

4 I just -- we're really just -- it's just sheer  
5 speculation at this point, and I think that there's enough  
6 in the record certainly from the Government's own witness on  
7 cross that he was undergoing different dental procedures.

8 So I think to put this in front of the jury, you  
9 know, really is a matter of speculation. And they want to  
10 be able to say that he was intentionally putting Mr. Blanton  
11 off, which is -- which goes to the heart of some of their  
12 charges in terms to redemptions and things like that.  
13 There's no sufficient basis for this to be really relevant  
14 and of value to the jury.

15 THE COURT: I think there is sufficient testimony  
16 and e-mails that demonstrate an ongoing sense of frustration  
17 by some of the investors, that they're not getting responses  
18 from Mr. Shkreli, and this is one among many that gives a  
19 reason and there's no proof that the reason given is not  
20 true. And I think that the point that the Government wishes  
21 to make regarding alleged evasion or ignoring of redemption  
22 requests from investors have been made through evidence.

23 I am inclined to exclude 105-7 at this time.

24 I understand that there have been surrounding or  
25 belated testimony of the evidence, but I think this part

1 will be withdrawn or excluded from the jury's consideration.

2 Can we talk about the next one at issue which is  
3 125-30? This is the Spencer Spielberg share registration,  
4 the changes for defense to Mr. Greebel for the settlement  
5 which included 6,000 restricted shares of Retrophin.

6 MR. SRINIVASAN: Yes, Your Honor. I think  
7 Your Honor's already ruled on a settlement agreement that  
8 ties out the transaction.

9 THE COURT: All right. I would tend to agree.  
10 I will hear from the defense.

11 MR. AGNIFILO: Yeah. Judge, it's just we objected  
12 to this as Your Honor knows. Your Honor made a final  
13 ruling, and I don't need to belabor the record. We continue  
14 to objection for all the reasons we said before.

15 THE COURT: All right. I do believe the  
16 Government has sufficiently established the admissibility of  
17 this document and tied it to the rest of the case.

18 The same would be true for 125-39, Mr. Yaffe and  
19 his Standard Registrar shares in the amount of \$15,000 for  
20 his consulting agreement. There was testimony that he gave  
21 regarding asking the registrar to reissue the shares for  
22 EFAY rather than to himself, so I believe the Government's  
23 Exhibit 135-29 should be admitted and I don't think the  
24 defense raised a similar objection.

25 MR. AGNIFILO: We did not because Mr. Yaffe

1 testified.

2 THE COURT: All right.

3 You next have Government's Exhibit 125-46, which  
4 is the document in the Standard Registrar regarding  
5 distribution of shares to investors and also the shares that  
6 were provided to the designated group of Retrophin employees  
7 who were reportedly no longer employed by Retrophin. I  
8 think this is directly relevant. If Mr. Agnifilo wants to  
9 be heard on Government Exhibit 125-36. I will be glad to  
10 hear him.

11 MR. AGNIFILO: I think the basis -- I think the  
12 basis for our objection was the fact that the settlement and  
13 release agreement of Mr. Lavelle was attached to this  
14 document and so for the reasons we put on the record I think  
15 at length by this point, we objected to that because  
16 Mr. Lavelle did not testify. So I don't need to belabor the  
17 issue anymore other than to remind the Court that we had  
18 objected and stated the base grounds.

19 THE COURT: All right. Thank you. So 125-46 will  
20 remain part of the trial record given my prior rulings.

21 And I guess the last one here is  
22 Government Exhibit 349A, which is the series of -- I don't  
23 know whether it was instant messages or texts.

24 MR. SRINIVASAN: That's right, Your Honor. This  
25 is an exhibit that we used with Caroline Stewart and the --



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1 the instant messages that she has are with Kevin Mulleady.

2 And then later on when we were admitting exhibits  
3 to the case agent we also had Government's Exhibit 349 which  
4 showed that this chat had been forwarded on by Kevin  
5 Mulleady to Marek Biestek and eventually to the defendant.  
6 So there's going to subject to connection to the defendant  
7 knowing about the chat and then Marek Biestek and then Kevin  
8 Mulleady having notice of the facts, so I think we've  
9 established that language.

10 THE COURT: I would agree. I think just for the  
11 record what's redacted from 349A is Mr. Biestek's forwarding  
12 of the e-mail to Mr. Shkreli. Mr. Shkreli commenting about  
13 her being emotional, oh, well, something like that.

14 MR. SRINIVASAN: Yes.

15 THE COURT: So I think --

16 MR. BRAFMAN: Your Honor, if I could. I think  
17 there are a number of different layers of hearsay on this  
18 document. I'm looking at -- I'm looking at Bates 21052 and  
19 I know we did not object to it at the time. So I'm aware of  
20 that.

21 MS. KASULIS: The document has already been  
22 admitted. This has already been admitted.

23 THE COURT: It has been admitted, it has been  
24 published and you did not object at that time.

25 MS. KASULIS: Yeah.

1 THE COURT: Then --

2 MR. AGNIFILO: All right. Outnumbered three to  
3 one, I'll sit back down.

4 THE COURT: Well, you know, I think obviously --

5 MR. AGNIFILO: We didn't object at the time. What  
6 I -- I noticed after we didn't object at the time is that  
7 there -- there's a number of sort of multiple layers of  
8 hearsay. For instance, Caroline Stewart says, I was just  
9 told that he blew up. Stalin, who I think is another  
10 employee, didn't get paid for a month.

11 THE COURT: Okay. We've identified the culprit.  
12 Okay.

13 MR. AGNIFILO: I'm sure Stalin doesn't really get  
14 paid anyway. You know, this is obviously something that  
15 Caroline Stewart learned. This is not her personal  
16 knowledge.

17 We didn't object at the time, I know that, but  
18 it's still double hearsay without the exception at these  
19 levels.

20 THE COURT: All right. It's in evidence, the  
21 objection, I believe, is waived and now retroactively you're  
22 trying to assert it but we did have testimony both from  
23 Ms. Stewart and Special Agent Braconi regarding the exhibit,  
24 it was admitted, and 349 through the Agent and 349A through  
25 Ms. Stewart and accordingly I will not eliminate 349A from

1 the trial record.

2 So with that does is the Government prepared to  
3 rest?

4 MS. KASULIS: Yes, Your Honor, the Government  
5 rests.

6 THE COURT: All right. Well, what we will do is  
7 obviously have you make that formal statement in front of  
8 the jury as well as allowing the defense to make that  
9 statement in front of the jury when they return tomorrow.  
10 But I think at this point, Mr. Agnifilo wanted to heard on  
11 this Rule 29 motion, unless there was something else I  
12 needed to deal with.

13 MS. KASULIS: And, Your Honor, could we just note  
14 for the record the defense is resting as well just to be  
15 clear.

16 MR. BRAFMAN: Yes, the defense rests, Your Honor.

17 THE COURT: All right. Thank you.

18 MR. AGNIFILO: And, Your Honor, this is going to  
19 be a very brief Rule 29 motion at the end of the  
20 Government's case. There are obviously eight counts in the  
21 indictment of conspiracy to commit securities fraud as far  
22 as Count 1 --

23 THE COURT: Why don't you come forward and speak  
24 into the microphone, and slowly, please.

25 MR. AGNIFILO: There's eight counts in the

1 superseding indictment. Count 1 is conspiracy to commit  
2 securities fraud.

3 Count 2 is conspiracy to commit wire fraud.

4 Count 3 is substantive securities fraud, all  
5 having to do with MSMB Capital.

6 Count 4 is conspiracy to commit securities fraud.

7 Count 5 is conspiracy to commit wire fraud.

8 Count 6 is substantive securities fraud in regard  
9 to MSMB Healthcare.

10 Count 7 is conspiracy to commit wire fraud with  
11 regard to Retrophin.

12 And Count 8 is conspiracy to commit securities  
13 fraud in regard to the unrestricted shares. That's the way  
14 it is dubbed in the indictment.

15 Our argument, Judge, is that there's legally  
16 insufficient evidence to substantiate each of the eight  
17 charges.

18 I note that in regard to five of the charges, five  
19 of the charges relate to a violation of Rule 10B5 and  
20 specifically Count 1 is the MSMB Capital conspiracy is,  
21 relies on Rule 10B5.

22 Count 3 of the MSMB substantive count relies on  
23 10BA.

24 Count 4 of the MSMB Healthcare conspiracy count is  
25 a 10B5 count.

1 Count 6, the MSMB Healthcare substantive count is  
2 10B5 count.

3 And Count 8, the unrestricted securities scheme  
4 also relied on 10B5.

5 10B5 has, as Your Honor well knows, I'm not trying  
6 to tell the Court it doesn't know at this point, has three  
7 different subsection. Subsection A relates to employing any  
8 device, scheme or artifice for the fraud.

9 B relates to making an untrue statement of  
10 material facts or an omission of material facts necessary in  
11 order to make the statements that are made not misleading.

12 And C relates to engaging in any act, practice or  
13 course of business which acts as a fraud or deceit upon any  
14 person.

15 In regard to the five counts that relate to a  
16 violation of 10B5, it's our allegation that the Government  
17 has not proved fraud under any of the three subsections.  
18 There's been insufficient evidence to establish fraud under  
19 any of the three subsection of 10B5.

20 In regard to the charges in the indictment, and  
21 I'll go very briefly count by count. In regard to the -- my  
22 read of the MSMB Capital and then Healthcare count, so 1  
23 through 6, is that in a sense, and the Government can  
24 correct me if they see it somewhat differently, those  
25 clusters of counts are broken into two overarching sections.

1 There's the inducement part and then there's the -- the  
2 prevention of redemption part, and then the Government  
3 allegations both in regard to 1 through 3 in regard to  
4 Capital and then alleges both in regard to 4 through 6 in  
5 connection with Healthcare.

6 Specifically in regard to the MSMB Capital hedge  
7 fund scheme, and I'm reading from the indictment. It's  
8 Page 4, Paragraph 8 it says, Martin Shkreli together with  
9 Co-Conspirator 1 in an effort to induce investments in  
10 MSMB Capital represented to potential investors *inter alia*  
11 among other things that, I, MSMB Capital was a transparent  
12 investment vehicle for sophisticated investors of monthly  
13 liquidity.

14 Roman Numeral II, the investment advisor is  
15 entitled to receive a 1 percent management fee per year  
16 based on net assets of the partnership.

17 Roman Numeral III, the general partner was  
18 entitled to receive 20 percent of the limited partners net  
19 profits for the year.

20 And Roman Numeral IV, MSMB Capital had retained  
21 independent Certified Public Accountants as auditors who  
22 would issue an audit report on the annual financial  
23 statements.

24 In regard to those four manners and means, if you  
25 will.

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1 THE COURT: And I will just tell you, though, they  
2 also said in addition to the representations and additional  
3 representations about Mr. Shkreli's upset with the portfolio  
4 manager, et cetera.

5 MR. AGNIFILO: Yes.

6 THE COURT: So it's beyond just those four.

7 MR. AGNIFILO: Yes, admittedly, and they say it's  
8 among other things.

9 THE COURT: Right.

10 MR. AGNIFILO: Even in the language.

11 But I do argue at this point that in regard to the  
12 MSMB Capital hedge fund scheme, there's been insufficient  
13 evidence shown that the -- that a reasonable investor would  
14 rely on the statements and the omissions. And in regard to  
15 the omissions as -- as -- we've had a fair amount of  
16 discussion about this. The omission can only be an act in  
17 furtherance of a fraud scheme if one of two things happen:  
18 Under the wording of 10B5 subdivision B, the omission of a  
19 material fact is -- is -- makes something that is said  
20 misleading and then alternatively, there's Supreme Court  
21 decisions *Basic versus Levenson* was cited some of the cases  
22 before that say that there's no -- there's nothing wrongful  
23 about an omission unless the person omitting has an  
24 affirmative duty to disclosure that which is omitted.

25 So given that legal rubric, I don't believe that

1 the evidence shows that a reasonable investor would have  
2 made investment decisions on the material statements on the  
3 alleged statements that are alleged to be material or on  
4 omissions that are the subject of Counts 1 through 3.

5 Now, I am mindful that there has been evidence of  
6 different investors giving their subjective beliefs as to  
7 certain things that they wanted to see from the investment.  
8 For instance, Mr. Coker said that he was very interested in  
9 liquidity. And Your Honor remembers, I don't need to go  
10 through that. Your Honor's very well versed in evidence.

11 But our argument at the end of the day is that at  
12 this point there's insufficient evidence to show that a  
13 reasonable investor would have made invest decisions on the  
14 specific statements or omissions that comprise Counts 1  
15 through 3.

16 Now, in regard to --

17 THE COURT: Is that not a jury determination,  
18 though, based on the evidence before the jury to decide  
19 whether or not a reasonable investor would find the  
20 representations or omissions material to their investment to  
21 an investment decision?

22 MR. AGNIFILO: Certainly the standard of a motion  
23 to dismiss at the end of the Government's case is a high one  
24 on us, I admit that, I knowledge that. And if Your Honor's  
25 of the view that this is a question that should go to the



1 jury that is not so clearly insufficient, that's a question  
2 that should go to the jury, yes, that is certainly the right  
3 thing to do.

4 But for the purposes of the motion, my argument is  
5 even though we acknowledge the high bar that we have at the  
6 Rule 29 phase, we think based on the credible evidence in  
7 our argument that based on the credible evidence elicited as  
8 to Counts 1 through 3 that there has not been sufficient  
9 evidence to show materiality or to show that a reasonable  
10 investor would have used the statements or the omissions as  
11 part of the overall rubric of his or her investment  
12 decision. And that's our argument on 1 through 3.

13 Similarly for 4 through 6 and I'll just review 4  
14 through 6 because the allegations are somewhat different.  
15 Some of what the Government claims is evidence and the  
16 allegations in regard to these inducement portion of  
17 Counts 4 through 6 is found on Page 8 in Paragraph 16. And  
18 among the things that the Government alleges in the  
19 indictment is that Mr. Shkreli did not fully inform the  
20 investors of his past performance as a portfolio manager.  
21 The indictment goes on to talk about the Merrill Lynch  
22 liability stemming from the Orex trade.

23 In Paragraph 17 the Government alleges material  
24 misrepresentations to potential investors that  
25 MSMB Healthcare's assets under management.

1           And then in terms of the second prong, I would  
2 say, of the theory, the -- the inability of the investors to  
3 redeem their investments in a timely fashion, the Government  
4 refers, just the things in Paragraph 18 here, such as  
5 contrary to Shkreli's representations, Roman number I, the  
6 original MSMB Capital investors who invested in 2009 lost  
7 their investments not double they money net of fees, and the  
8 other things alleged here in Paragraphs 18 and also in  
9 Paragraph 19 and 20.

10           Again, Your Honor's very well versed in the  
11 evidence, I don't know need to go through it all.

12           I think part of the overarching problem with some  
13 of Counts 1 through 6 is many of the investors indicated  
14 pretty clearly that they decided to invest with Martin  
15 Shkreli, not because of the PPM, indeed many of the  
16 investors said they didn't read the PPM. I remember Lindsay  
17 Rosenwald said gave it to his lawyer. Other investors said  
18 they didn't read the PMM, that they invested with Shkreli  
19 either because of something another investor said;  
20 Mr. Blanton was speaking to Mr. Shkreli about him in very  
21 positive terms. That seemed to have some influence over  
22 some of these other investors in the Dallas area who then  
23 decided to invest. So I think the credible evidence as we  
24 sit here today is in regard to a lot of these investors.

25           They really did not focus or care about what was

1 in the PPM, what Shkreli's track record was and that's in  
2 part because so many of the investors had actual track  
3 records with Shkreli, personal track records like  
4 Mr. Blanton had a personal track record where he was very  
5 successful with Shkreli, so he told some of his investment  
6 friends and colleagues, they also invested with Shkreli.

7 So our argument in a general matter on Counts 1  
8 through 6 is that the specific statements and the specific  
9 omissions that the Government is alleging is comprising  
10 those six counts are, A, not material.

11 And, B, not things that a reasonable investor  
12 would rely on and, in fact, not things that the individual  
13 investors who ended up investing, in fact, relied on.

14 THE COURT: Well, I guess what you are doing is  
15 you saying you used the term many investors, I don't think  
16 it is many, I think it is two out of the group that did  
17 testify. A few of them did, you're right, not pay much  
18 attention to the PPM.

19 But I think what's uniform about all of the  
20 investors who testified is that they did care about and pay  
21 attention to the monthly performance reports and, in fact,  
22 they relied upon those reports to feel that their investment  
23 was making money and use it as a benchmark during the  
24 redemption process from which they were demanding the  
25 redemption.

1           So I think that it is a somewhat captive view of  
2 the evidence to argue that two investors didn't -- or I  
3 think you characterized it many investors didn't look at the  
4 PMM. There are other issues that I think reasonable  
5 investor at least exemplifies through this testimony that  
6 these investors paid attention to. And as you know, so that  
7 it is perfect, I have to construe the evidence in the light  
8 most favorable to the Government, as I would, you know,  
9 after the verdict, if you choose to renew your motion which  
10 I am expecting you will.

11           MR. AGNIFILO: Yes.

12           THE COURT: If it --

13           MR. AGNIFILO: No, I acknowledge -- as I said,  
14 this a high bar for us and, yes, Your Honor is obligated  
15 under the law to view all this evidence in the light most  
16 favorable to the Government. So understanding that those  
17 are my arguments on Counts 1 through 6.

18           THE COURT: Okay.

19           MR. AGNIFILO: Now, Count 7 I don't believe  
20 there's -- I believe the credible evidence on Count 7 is  
21 that the Board members were apprised of the settlement  
22 agreements and the consulting agreements. They were  
23 apprised several different ways. I think the -- the  
24 credible evidence is that in connection with different Board  
25 calls, specifically I'm thinking about in -- in June

1 of 2013, there was an e-mail from Mr. Panoff that indicated  
2 that attached certain documents indicating certain  
3 settlement agreements.

4 Then in September there was another Board call in  
5 September, I believe it was September 9th where Mr. Panoff  
6 as the at the time attached, I think, the connection with an  
7 e-mail from September 9th four different documents, if I  
8 recall, a Marcum letter, a financial statement, and then two  
9 draft SEC filings that each indicated the existence of the  
10 settlement agreements. And specifically in the Marcum  
11 letter, the amount of the settlement agreements were broken  
12 out.

13 And then in the draft SEC filings the total amount  
14 of the settlement agreements was actually set forth in the  
15 filing.

16 Those filings, if I remember correctly, were  
17 actually filed with the SEC four days later on  
18 September 13th. So the Board members would have had four  
19 full days, not talking about the time in advance of the  
20 call, but would have had four full days to read the  
21 materials that were sent to them by the CFO and to  
22 understand them before signing them. And at the end of the  
23 day every member of the Board signed those SEC filings. And  
24 I understand the testimony was -- at least from our  
25 perspective -- these Board members saying that they signed

1 it but they read it in a hurried fashion, they didn't really  
2 focus on it. I don't know that that is the type of evidence  
3 that could result in a -- even in this count going to the  
4 jury, quite frankly. There's just -- there's not much else  
5 one can do in a corporate setting other than send important  
6 Board documents to members of the Board, especially when  
7 those documents are SEC filings.

8 SEC filings that under different rules and  
9 regulations Sarbanes-Oxley I think there's some testimony at  
10 trial about the obligations under Sarbanes-Oxley and on  
11 Board members to read those documents, to understand those  
12 documents and to sign those documents as a manifestation of  
13 that Board member's statement that that Board member read  
14 and understands that document.

15 And these are now SEC filings in the record.  
16 These are SEC filings that these Board members could have  
17 easily gone on the Edgar website to see and for the Board  
18 members to come into court and say, Well, we don't know  
19 about it even though yes, we signed SEC filings, I don't  
20 think we're really even here or there. I think from a  
21 notice and intent standpoint it's clearly Mr. Shkreli, who  
22 is also copied on the Panoff September and June e-mails,  
23 would have been aware at that point that members of the  
24 Board had these documents.

25 It was on the Board agenda, as I think entry

1 Number 9 in the September letter from Mr. Panoff. And I  
2 understand that Mr. Richardson said, We don't think we got  
3 to Number 9, but it was clearly there.

4 In regard to the consulting -- in regard to the --  
5 the Banta --

6 MR. BRAFMAN: Al Geller.

7 MR. AGNIFILO: -- and the Al Geller, yes. The  
8 Banta and Al Geller agreement, the agreements were actually  
9 attached in the o September Panoff e-mail. The Board  
10 members would have had them. At a later date an S1 is  
11 filed. The S1 had in a document that was signed by each and  
12 every Board member essentially a draft settlement agreement,  
13 a form of settlement agreement, obviously without an  
14 individual name as being the settler. But the actual  
15 agreement is attached to the S1? Every member of the Board  
16 signed that document with the draft -- with -- with -- with  
17 an actual version of the settlement agreements, so I think  
18 at a certain point and I think we passed that point, a  
19 defendant just can't be in a position of doing something  
20 essentially to defraud the Board or behind the Board's back  
21 or to deceive the Board under these circumstances.

22 And so, quite frankly, with Counts 1 through 6, I  
23 full expect that -- that given the burden that we have and  
24 the light most favorable to the Government, Your Honor's  
25 going to let those counts go to the jury.

1 I think Count 7 is on a totally different footing.  
2 I think Count 7 is really the type of -- what we have in the  
3 record is really undisputed. There's no dispute that these  
4 Board members signed the SEC filings. None. They signed  
5 them. And I think as soon as that his is in record, I think  
6 this count is on thin ice and I think it's on thin ice. I  
7 don't think that even in the light most favorable to the  
8 Government, even with the burden that we have in  
9 establishing insufficient evidence at this stage that this  
10 count should go to the jury, most respectfully. That's  
11 Count 7.

12 THE COURT: All right. Do you want to just go  
13 through the last count and then hear from the Government or  
14 would you like the Government to respond.

15 MR. AGNIFILO: Sure. Whatever Your Honor wants to  
16 do.

17 THE COURT: Well, I am happy to hear you on Count  
18 8 as well.

19 MR. AGNIFILO: All right.

20 THE COURT: Then I will hear from the Government.

21 MR. AGNIFILO: Very good.

22 Count 8, I think like Count 7, in Count 8 it's --  
23 there's a lot -- there's a lot of smoke but no substance. I  
24 mean, with count -- I'm reminded of the Wendy's commercial,  
25 Where's the beef. And you have --



1 THE COURT: Nothing burger. It's a nothing  
2 burger.

3 MR. AGNIFILO: I'm sorry, judge.

4 THE COURT: It is a nothing burger. But I am not  
5 saying it is. It is not Where is the beef.

6 MR. AGNIFILO: I'm dating myself. I started on  
7 Where's the beef.

8 Right, so we have Mr. Pierotti and I went back and  
9 I looked at the Mr. Pierotti's testimony yesterday and he  
10 doesn't say that Mr. Shkreli said everyone should buy and  
11 sell, buy and sell, buy and sell to create volume. He  
12 answers a question and then he kind of goes off and he sort  
13 of goes off in left field and he talks about things that  
14 could happen. And he says, Well, you could have buy and  
15 selling, buy and selling and then he says that would be  
16 insider trading and that prompted a sidebar and we all went  
17 from there.

18 So he does not testify that Mr. Shkreli  
19 specifically said, I want people to buy and sell and buy and  
20 sell and create volume. He doesn't say that, so there's  
21 just no evidence of that in the record.

22 THE COURT: Doesn't he encourage them to buy and  
23 sell, he does not say because I want to create volume, but  
24 he does say please or applicably, you know, trade these  
25 shares and buy and sell.

1 MR. AGNIFILO: What he does --

2 THE COURT: He doesn't say the because.

3 MR. AGNIFILO: The e-mail that I think Your Honor  
4 is referring to is there's an e-mail he sends and a number  
5 of people, Blanton is copied on it. There are a number of  
6 people copied on it. There are some of the people in the  
7 group that we're, you know, talking about who ae copied on  
8 it. I think -- I think Tilles, I think Mulleady, I think  
9 those people are copied on it.

10 But it's also send to Blanton and a number of  
11 other people. And if Your Honor recalls the very next day  
12 Shkreli sends an e-mail to Pierotti and to Blanton basically  
13 putting them together so that they could, you know, transact  
14 some business.

15 Actually my Teny Geragos has been the heart and  
16 soul of the defense from the very --

17 THE COURT: She's amazing.

18 MR. AGNIFILO: -- beginning. We're putting that  
19 on the record. It's e-mail, Judge, from December 18th,  
20 2012, it's Government Exhibit 120-14. It's an e-mail that  
21 Shkreli sends to Brent Saunders, Darren Blanton, Marek  
22 Biestek, Tom Fernandez, Tim Pierotti, Kevin Mulleady, Ed  
23 Sullivan, George Haywood. I think that's it.

24

25 THE COURT: Haywood's also an employee of

1 Retrophin, right, or what does he do? Mr. Shkreli's shaking  
2 his head.

3 MR. AGNIFILO: Ms. Geragos is returning.

4 (Pause in proceedings.)

5 MR. AGNIFILO: Okay. I'm -- I'm informed by a  
6 reliable source that at one point he was a consultant but he  
7 was never an employee. Definitely -- I can't say that. I  
8 could go back and research that and get an answer for you.

9 THE COURT: I thought I saw an e-mail where he was  
10 using Retrophin either in e-mails or signature. I could be  
11 mistaken.

12 MR. AGNIFILO: That could be right. I don't want  
13 to go off the cuff on a question that Your Honor asked me.  
14 I'll go back and I'll take a look.

15 So -- so I don't think that this e-mail suggests  
16 anything untoward in terms of securities fraud.

17 THE COURT: Well, could you just read what it  
18 says.

19 MR. AGNIFILO: Sure, yes. So it starts with a  
20 Google alert and Google sends Mr. Shkreli a Google alert  
21 that says 30 under 30 hedge fund gaslight turns biotech  
22 entrepreneur. And it's obviously an article about Shkreli.  
23 Shkreli then writes to these people, Friends and  
24 shareholders see the new art go out on the deal from Forbes.  
25 One of my priorities for the future is increasing the

1 trading volume in our stock. Anything anyone can do to help  
2 in this regard is welcome.

3 Now, I don't think that it is wrong for an  
4 executive to want trading volume in the stock or even to  
5 encourage trading volume in the stock. What's wrong is to  
6 do it by fraudulent means and fraudulent means meaning some  
7 element of deception. What -- and I'm not -- I'm sorry.

8 THE COURT: This is, I think what I understand the  
9 importance of this e-mail is that this is what is left to  
10 you who have free-trading shares and he is indicating to  
11 them that they should help out by increasing the is trading  
12 volume, which to the outside public could create a false  
13 impression about what is going on. And I think that one of  
14 the allegations, as I understand it, is to artificially  
15 increase or pump up the volume and perhaps the share price  
16 of the unrestricted shares.

17 So I think that e-mail was, you know, important to  
18 the evidence that the jury would consider regarding the  
19 conspiracy to commit securities fraud allegation.

20 Just my law clerk reminded me that the Haywood  
21 e-mail that we saw, he signed off as, I think, controller of  
22 Retrophin. There was an e-mail.

23 MR. AGNIFILO: I'll go back and check. That might  
24 be right. I don't know. Like I had said, I want to answer  
25 the question, the Court's question in a more thorough

1 fashion.

2 THE COURT: All right. I just wanted to go back  
3 the that.

4 MR. AGNIFILO: I don't believe that Blanton and  
5 Haywood had free-trading shares. I don't believe they did.

6 THE COURT: Well, the group did, the group of  
7 eight. G8 did.

8 MR. AGNIFILO: Some of them did.

9 But not -- but not all of them and -- but here's,  
10 I think, the larger point that I want to try to make: To  
11 the extent that the allegation is that this -- the alleged  
12 securities fraud here is, you know, sort of cabin, you know,  
13 pigeonhole as almost like pump and dump or something like  
14 that. Now it doesn't have to exactly be a pump and dump in  
15 order to be a securities fraud. But the essence of the  
16 typical pump and dump that we don't have here and we don't  
17 have anything remotely similar is in pump and dumps there's  
18 deception. In other words, there is invariably some type of  
19 public information that is deceptive in some way. There are  
20 false statements being made by the company to pump up the  
21 volume or the stock or price of the stock.

22 We don't have anything of that here. I don't  
23 think there's anything remotely inappropriate about  
24 Mr. Shkreli asking people to trade because through trading  
25 and through -- that the volume -- that the price of the

1 stock would go up. I think it's illegal when it becomes  
2 deceptive.

3 THE COURT: I tell you what one has to look at is  
4 the evidence about what happened before this December 18th  
5 e-mail. And again, construing the evidence in the light  
6 most favorable to the Government, what happened before this  
7 is that the e-mail was sent to this group of eight saying  
8 You're no longer Retrophin employees. But you are to go out  
9 and buy these unrestricted shares at a heavily discounted  
10 price. They are then asked to sign a document by  
11 Mr. Greebel in December, this is December 13th, where they  
12 say that they do not alone or together with any other person  
13 exercise control over Desert Gateway and they say, you know,  
14 I am not an officer, director or holder of more than  
15 10 percent.

16 The idea is that together those shares absolutely  
17 amount to more than 10 percent, I believe, and also allowed  
18 some exercise of control over those free-trading shares.

19 And then the covert act, Number C, on Page 31 of  
20 Paragraph 59, you know, is that e-mail where he, quote,  
21 fires everybody yet he is summoning people to come in to the  
22 office. Mr. Mulleady is told, Come in, we need you. He's  
23 sick, but he's to come in. Pierotti is told, Come in, we  
24 need you to work.

25 And so I think that there is a level of

1 obfuscation or deception that is being conveyed to the  
2 outside world, but within Retrophin there's this group of  
3 eight who are taking direction which, for the most part with  
4 a few exceptions, specifically Mr. Pierotti and maybe  
5 Mr. Fernandez to some extent, but they're taking directions  
6 from Mr. Shkreli regarding those shares.

7 And moreover those shares from those group of  
8 eight are being used to final up claims with certain  
9 MSMB Capital, Alea Capital and MSMB Healthcare Investors.  
10 So there's control over their shares.

11 MR. AGNIFILO: One thing I point out, and listen I  
12 think in the light most favorable to the Government and the  
13 burden that we have here, I think this is -- is not as  
14 strong a motion for us, quite frankly, as Count 7, but just  
15 give me one second.

16 (Pause in proceedings.)

17 THE COURT: I mean, Mr. Pierotti was very clear I  
18 never worked for MSMB.

19 MR. AGNIFILO: Right.

20 THE COURT: He was with MSMB Consumer, which was  
21 the strip club hedge fund.

22 MR. AGNIFILO: Right.

23 THE COURT: And that is it. And, you know, he was  
24 told to come into the office. So I think that there is  
25 enough evidence to go to the jury on --

1 MR. AGNIFILO: That's fine.

2 THE COURT: -- this.

3 MR. AGNIFILO: Okay, very well. Thank you.

4 That's it, I have nothing else unless Your Honor has any  
5 questions.

6 THE COURT: Does the Government want to be heard?  
7 I mean, maybe you should address Count 7.

8 MS. KASULIS: Yeah. Your Honor --

9 THE COURT: I mean, of all the counts I think  
10 Mr. Agnifilo does raise some issues that you should address.

11 MS. KASULIS: Yes, Your Honor. With respect to  
12 Counts 1 through 6 and Count 8, I think it's clear that we  
13 have met the Rule 29 hurdle. Your Honor clearly understands  
14 the standard to construe all the evidence in the light most  
15 favorable to the Government and our position is that we have  
16 clearly met that burden with respect to Counts 1 through 6  
17 and Count 8.

18 With respect to Count 7, I just want to clarify  
19 with respect to the timing of the Board members' knowledge  
20 of the agreement. I think what Mr. Agnifilo was referring  
21 to with respect to the June of 2013, it was an e-mail from  
22 Mr. Panoff in July of 2013 attaching a cash flow summary  
23 that ends at June 30th, 2013 that has that line item about  
24 settlements in which the Board members both testify that  
25 that issue was not raised, not discussed. And then again at



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1 this point in time the vast majority of the money is gone.  
2 It's already paid out. From the agreement, I think there's  
3 a subsequent agreement in August which is again not raised  
4 to the Board, and then the money and the shares are paid  
5 out. So I think the timing here is very important,  
6 Your Honor. The Board members do become aware of the  
7 agreement in the fall of 2013, but again, they're not  
8 provided with the full and complete information as to what  
9 the agreements are truly about and why these individuals are  
10 being paid by Mr. Shkreli through Retrophin in the way that  
11 Mr. Shkreli is doing that.

12 (Continued on next page.)  
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1 MS. KASULIS: And so I think that, again, if the  
2 board members, you know, are reviewing documents or saying,  
3 okay, go ahead and file these SEC filings, they're relying  
4 on their auditors, they're relying on Mr. Greebel who we  
5 believe is a co-conspirator and is general counsel at that  
6 point and acting as counsel for the firm or the company.  
7 They're relying on them to say, okay, this seems all right.

8 And then Mr. Shkreli, of course, has to enter into  
9 indemnification agreements and promissory notes to pay the  
10 company back. So I think the timing here is very important,  
11 and that it's clear the board members did not have a full  
12 and complete understanding as to what the settlement  
13 agreements were about and the settlement agreements that  
14 caused these restatements.

15 And then I think that there were two other means  
16 in Count Seven by which Retrophin was defrauded, neither of  
17 which the defense has argued about, which is the backdated  
18 creation of the MSMB Capital interest in order to try to  
19 compensate or to pay off MSMB Capital investors who had been  
20 defrauded. And then the other prong was the consulting  
21 agreement prong with respect to Mr. Yaffe who was a  
22 defrauded -- or, excuse me -- an Elea investor who had lost  
23 all his money and that Mr. Shkreli had promised to pay back.

24 And then just to make the record clear, we're not  
25 arguing the Geller consulting agreement, and so that I think

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1 was a point of the defense's argument with respect to the  
2 Rule 29, and we are not arguing with respect to the Geller  
3 consulting agreement, that that is an additional basis of  
4 the fraud. So, again, I think construing the evidence in a  
5 light most favorable to the government we satisfy the  
6 hurdles with respect to all counts in the indictment.

7 THE COURT: All right. Thank you.

8 I do believe there's enough evidence to go to the  
9 jury. Obviously, the parties will have by way of attorney  
10 motions, if necessary, after the verdict. So, respectfully,  
11 I'm going to deny the motion at this time.

12 Is there anything else? I think I did want to  
13 discuss a few other matters with the parties before we turn  
14 to the specific instructions.

15 MS. KASULIS: Your Honor?

16 THE COURT: Yes.

17 MS. KASULIS: Just two housekeeping matters with  
18 respect to the summations. I think one of the issues, and  
19 we raised this I think in the last couple days about the use  
20 of the electronic devices in the courtroom. I think some of  
21 the issues with respect to the opening and the overflow room  
22 was the microphone issue of really having to almost like  
23 hold the microphone up to your mouth for the overflow room  
24 to hear.

25 Is there any way -- I don't know if it's possible

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1 to do some sort of a lapel mic on the attorneys who are  
2 doing the summations and the rebuttal just to make sure that  
3 the overflow room can hear all of the parties' closing  
4 arguments.

5 THE COURT: We will look into that. Ms. Jackson  
6 can check with our IT people and see.

7 MS. SMITH: And then, Your Honor, one other thing.  
8 I'm going to be using the PowerPoint, and the screen is  
9 obviously behind me when I'm facing the jury. In the past  
10 the kind of the monitors on the side have been facing the  
11 jury as well and so I've been able to see them. Here  
12 they're all facing out. I don't know if it's possible to  
13 either get a third monitor for tomorrow that can actually  
14 face this way or to, you know, in a worse-case scenario, I  
15 would ask that this at least be flat just so I can, without  
16 having to turn around for every slide, see what's up on the  
17 screen for the jury. That's the only other kind of request.

18 THE COURT: All right. Ms. Jackson will inquire  
19 today. We might have to flip that monitor around and shift  
20 the press over to the other side.

21 MS. SMITH: Okay. I just wanted to raise that  
22 before. Thanks.

23 And also we're happy to come a little bit early  
24 tomorrow and do a test for the overflow. We tested the  
25 PowerPoint yesterday at lunch, but we can come early if that

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1 would be helpful for the AV setup.

2 THE COURT: We can be here early. We are here  
3 early so you can test it or later today even.

4 MS. SMITH: Great.

5 THE COURT: Should we turn to the instructions?

6 I think, as I recall, you expect that the  
7 government will close, for the most part, in the morning;  
8 the defense will close, for the most part, in the afternoon;  
9 and rebuttal will be offered Friday morning.

10 The charges, as you can see, are quite lengthy.  
11 It will probably take me a couple of hours to read them and  
12 then the jury will start deliberating. So I would ask that  
13 we have a complete set of exhibits to send back to the jury  
14 and hopefully you have both verified with Ms. Jackson what's  
15 in evidence and what isn't and we won't have any delays on  
16 providing exhibits.

17 What I'd like to do when the jury asks for a read  
18 back is we try to identify a portion of the transcript that  
19 will be provided to the jurors rather than having them come  
20 back in and have the Q and A read for them. I think that  
21 the court reporters have tried to segregate sidebars, but  
22 oftentimes we also have to redact objections so that they  
23 just see the testimony.

24 MR. BRAFMAN: Your Honor, can I ask in terms of  
25 scheduling, if the government has any further update on how

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1 long you think the opening summation will be?

2 MS. SMITH: Your Honor, I don't. I mean, I think  
3 I had said three to three and a half hours and I think  
4 that's about right. I can't see it going significantly  
5 longer and I don't think it's going to be shorter than that.

6 MR. BRAFMAN: Could we try our best, if at all  
7 possible, to complete the government's opening before we  
8 give the jury a break for lunch if it's close so that I  
9 don't have to go into the next day on Friday with part of my  
10 summation? I need, you know, if we start the defense  
11 summation at 2 o'clock, for example, I think I can finish it  
12 all before we excuse the jurors so we don't have to go into  
13 Friday. But I don't want to have to start at 3 o'clock and  
14 then go over if it's not necessary. So we'll all try and be  
15 here at 9:00. But if they're doing three, three-and-a-half  
16 hours I think it should be done before 1:00, 1:15 at the  
17 latest.

18 MS. SMITH: I think that's right. And, obviously,  
19 with a break in the middle, you know. And I can figure out  
20 a good stopping point for a midmorning break as well. I  
21 mean, I'm certainly going to try and keep it to that length.

22 MR. BRAFMAN: And, Judge, what is Your Honor -- I  
23 think the superseding indictment is not in its present form  
24 something that can go back into the jury room. It talks  
25 about the employees and people that would not normally be in

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1 an indictment that a jury would see.

2 My request would be that there is a cleaned-up  
3 redacted copy that the government gives us to look at. I  
4 think Ms. Kasulis has one in her hand.

5 MS. KASULIS: I do.

6 MR. BRAFMAN: Can we get one and then we'll notify  
7 the Court if we have any objections to the redacted copy?

8 I assume the Court will give them a copy to take  
9 back or is that --

10 THE COURT: Well, I probably would just because of  
11 the number of counts and the dense recitals of facts in the  
12 indictment.

13 MR. BRAFMAN: And is it Your Honor's --

14 MS. KASULIS: Excuse me. I'm sorry, Mr. Brafman.

15 Just to be clear with respect to what I've handed  
16 to Mr. Brafman, we didn't redact because we didn't want it  
17 to look as if there are other people who have been charged  
18 and so what we did is we just made a Martin Shkreli focused  
19 only version.

20 MR. BRAFMAN: Did you take out references to  
21 employees?

22 MS. KASULIS: So what we did was when there were  
23 references to like Corrupt Employee 1 or Investor 1 or  
24 Investor 2, we actually put those individuals' name in for  
25 who is Investor 1, who is Investor 2 because I think the

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1 jury needs to know that for the overt acts piece in  
2 particular.

3 THE COURT: And then you made the change based on  
4 our -- let me just speak to my law clerk.

5 MS. KASULIS: Oh, I'm sorry. And then for  
6 Mr. Greebel we made him appear like any other individual.

7 (Brief pause.)

8 MR. BRAFMAN: Your Honor, is it the Court's  
9 practice to give the jury a copy of your charge or only if  
10 they request?

11 THE COURT: No, I usually do give them a charge.

12 MR. BRAFMAN: Okay. Thank you.

13 THE COURT: Because if I can speak that long and  
14 they can listen that long, I think it's almost impossible on  
15 both ends, and I'd like to give them the instructions so  
16 they can refer to it.

17 MR. BRAFMAN: And can I ask, am I correct that the  
18 Court will not ask the jury to deliberate on the weekend?  
19 So if they don't reach a verdict by Friday at 5:00 then --

20 THE COURT: I will not ask them to deliberate on  
21 the weekend.

22 MR. BRAFMAN: I'm sorry?

23 THE COURT: No, I won't.

24 MR. BRAFMAN: Okay. Thank you.

25 THE COURT: So would you like to get started?



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1 MS. KASULIS: Sure.

2 THE COURT: And I guess what I would say is each  
3 party should feel free as we go through. I think what I'll  
4 do you is I'll just use the table of contents and I'll just  
5 state the number of each charge, and then if there is an  
6 objection or a proposed amendment, I will be glad to hear  
7 from the parties.

8 All right. So we have Charge One, and if you have  
9 an objection, please speak up. Charge Two. Charge Three.  
10 Four.

11 MS. KASULIS: Your Honor, just hold on. I'm  
12 sorry. I did it by page number and so.

13 THE COURT: Okay.

14 MS. KASULIS: With respect to Charge Four I just  
15 think there's one typographical error.

16 THE COURT: All right. Sure.

17 MS. KASULIS: It's page 9. I just think in the  
18 paragraph starting "Every defendant starts with a clean  
19 slate."

20 MR. BRAFMAN: I really can't hear you, Jackie.

21 MS. KASULIS: I'm sorry.

22 THE COURT: Let me turn on the microphone.

23 MR. AGNIFILO: Can we do this in a way just so  
24 we're more sort of like facing each other.

25 THE COURT: I can come sit down there. I just

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1 want to be near my clerk who might have to do some research  
2 for us.

3 MR. BRAFMAN: If we just do it at the podiums.

4 Your Honor, if you stay and we do it at the  
5 podiums I think that will work.

6 THE COURT: Sure. We can do that.

7 MR. AGNIFILO: Page 9?

8 MS. KASULIS: Yes, page 9.

9 THE COURT: The paragraph starting with "Every  
10 defendant."

11 MS. KASULIS: Right. I think it says "Every  
12 defendant starts with a clean state and is presumed innocent  
13 of each chart." I think it's each of the charges.

14 THE COURT: Yes. Thank you.

15 MS. KASULIS: That was my only proposal for that  
16 charge.

17 MR. AGNIFILO: And we agree. That's fine. Yes.

18 THE COURT: Charge Five.

19 MR. AGNIFILO: Reasonable doubt. Yeah, that's  
20 fine.

21 THE COURT: Charge Six.

22 MR. AGNIFILO: One second. Okay. All right.

23 For Charge Six, and this is not a big one, this is  
24 just a really miniscule one. On page 14, any exhibits  
25 identified but not admitted into evidence by the Court,

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1 obviously, that's right. My concern is -- what I was  
2 proposing is any exhibits identified but not admitted into  
3 evidence by the Court are not evidence, however, the  
4 testimony concerning such an exhibit is testimony like any  
5 other testimony or something along those lines so that they  
6 don't somehow think that if a piece of evidence wasn't  
7 actually admitted, that there's nothing in the record about  
8 such a thing. And I know you talk about testimony I think  
9 three or four pages earlier, but it just seems to round out  
10 the concept.

11 THE COURT: So how about we add comma, however,  
12 testimony regarding such exhibits may be considered.

13 MR. AGNIFILO: Sure. That's fine.

14 MS. KASULIS: Your Honor, I'm sorry. What was  
15 that?

16 THE COURT: Is that all right with you?

17 MR. AGNIFILO: So it's, however, testimony about  
18 concerning such exhibits can be considered.

19 MS. KASULIS: Okay.

20 MR. AGNIFILO: One of the things as a general  
21 matter because it's in different parts, and I don't want to  
22 jump the gun, is I think what the government has done in the  
23 indictment that they just gave us, which is the one that  
24 Your Honor is going to give back to the jury, is that rather  
25 than references to corrupt employee co-conspirator, maybe

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1 the person's names. So at some point we'll have to conform  
2 the charge to the indictment. And I think also eliminating  
3 certain overt acts, not in this indictment but in one that I  
4 think they're probably going to give us shortly.

5 MS. KASULIS: And we can hand up to the Court,  
6 Your Honor. We did make sure we double checked all the  
7 overt acts that are listed, and I think there were just two  
8 or three that we chose not to prove up. And so I can hand  
9 this to the Court so that Mr. Tata maybe. But also we could  
10 email Mr. Tata with a replacement for those sections.

11 THE COURT: Well, we would like to see your  
12 revised indictment, if you don't mind, and any other --

13 MS. KASULIS: And then what we'll do is --

14 THE COURT: -- proposed corrections.

15 MS. KASULIS: And we can email the revised  
16 indictment to Mr. Tata right after this. We did make all of  
17 the changes, but then realized we had not eliminated a  
18 couple of the overt acts in the version that we just gave to  
19 Mr. Brafman so we'll go ahead and eliminate those overt  
20 acts, renumber them and then circulate to the parties after  
21 this.

22 THE COURT: Was there anything else with regard to  
23 Charge Number Six?

24 MR. AGNIFILO: Not from us.

25 THE COURT: All right. What about Charge Seven?

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1 MR. AGNIFILO: That's direct and circumstantial  
2 evidence.

3 MS. KASULIS: Yes, Your Honor.

4 The government proposes to add with respect to the  
5 circumstantial evidence charge, I mean, we're always partial  
6 to giving an example like the umbrella example. I think  
7 that's very helpful for jurors to understand.

8 THE COURT: We had it in there. We took it out.

9 MS. KASULIS: I'm very partial to the umbrella  
10 example.

11 THE COURT: You know which one that is?

12 MR. AGNIFILO: Yeah. No, I do. The raining --

13 THE COURT: You may infer that it's raining if you  
14 see somebody come into the courtroom with a wet coat and a  
15 dripping umbrella.

16 MR. AGNIFILO: That's fine, Judge.

17 THE COURT: I think it is helpful, but, on the  
18 other hand, I did have a case where there was an objection  
19 to that example so we will have the rain example.

20 MS. KASULIS: Thank you.

21 THE COURT: What else?

22 MR. AGNIFILO: Nothing from us on Charge Seven.

23 THE COURT: Charge Eight.

24 MR. AGNIFILO: Inferences. Nothing from us on  
25 inferences.

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1 THE COURT: Charge Nine.

2 MS. KASULIS: So Charge Nine, Your Honor, because  
3 we did not actually -- Charge Nine seems to be geared  
4 towards statements made by a defendant to law enforcement  
5 like post arrest or, you know, in a proffer. And I  
6 recognize that when we submitted our proposed charges we  
7 were considering admitting statements by Mr. Shkreli from a  
8 meeting that he had with the FBI, but we decided not to  
9 proceed with admitting those statements. And so the concern  
10 with the way that Number Nine is written is it appears that  
11 he made statements to government officials, whether they  
12 were voluntary and understanding, it just has more of that  
13 post-arrest feel to it as opposed to just he was deposed.  
14 So our proposal is to eliminate it or modify it in a way to  
15 make it more directed towards the types of admissions.

16 THE COURT: The testimony?

17 MS. KASULIS: Exactly. That --

18 THE COURT: It was the testimony before the SEC  
19 really.

20 MS. KASULIS: Exactly.

21 THE COURT: And FINRA, as we established, is not a  
22 law enforcement agency.

23 MS. KASULIS: That's right.

24 THE COURT: So what would be best for doing this?

25 MR. AGNIFILO: I'm fine with modifying. I think

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1 that's exactly right. This is more geared to traditional  
2 law enforcement settings, which we don't have here.  
3 However, to the extent that the jury did hear about his  
4 statements to the SEC, I think we need to put something in.  
5 So I don't know if the government has a proposed  
6 modification. I'm happy to hear it. Or, if not, we can  
7 come up with one.

8 THE COURT: All right. So what if we say there  
9 has been evidence that the defendant made certain statements  
10 to the SEC.

11 MR. AGNIFILO: That's fine.

12 MS. KASULIS: Uh-huh.

13 MR. AGNIFILO: I don't think we have issues with  
14 voluntariness like we do in an interrogation setting.

15 MS. KASULIS: I was just going to say we should  
16 take that whose sentence out and just go I instruct you --

17 THE COURT: So we will take out the sentence that  
18 starts "In deciding what weight"?

19 MS. KASULIS: Yes.

20 THE COURT: Is that all right with you,  
21 Mr. Agnifilo?

22 MR. AGNIFILO: Yeah. Let me just see what it  
23 looks like once we do that.

24 So Your Honor is going to say there has been  
25 evidence that the defendant made certain statements to the

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1 Securities and Exchange Commission?

2 THE COURT: In which the government claims he  
3 admitted certain facts charged in the superseding  
4 indictment. Delete the next sentence and just leave the  
5 last sentence.

6 MR. AGNIFILO: That's fine. That's fine.

7 THE COURT: Charge Ten.

8 MR. AGNIFILO: Charge Ten. We're okay with Charge  
9 Ten.

10 MS. KASULIS: Same for the government.

11 THE COURT: Charge Eleven.

12 MR. AGNIFILO: Charge Eleven.

13 THE COURT: Credibility.

14 MR. AGNIFILO: Has Your Honor ever given what we  
15 used to call the falsus in uno charge. It says basically --

16 THE COURT: Yes, I know what that is, but I think  
17 that that is not necessarily the preferred charge.

18 MR. AGNIFILO: I know there's some cases in the  
19 Second Circuit that, at least the way I read them, say that  
20 there has to be some predicate in the record. And really  
21 what I'm thinking about, Judge, and the reason I started  
22 thinking of it last night is I thought that a fair reading  
23 of some of Mr. Pierotti's testimony is that he was, in the  
24 worse case scenario, lying or badly mistaken about certain  
25 things. For instance, he said, as a matter of fact, that



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1 Greebel got shares, that freely traded shares, which we know  
2 isn't true. It's not the government's theory that it is.  
3 He said that the consumer funded \$4.5 million. Maybe that  
4 was a mistake; maybe it wasn't a mistake. But I think when  
5 you start having, and there's other examples through the  
6 witness testimony.

7 And I'm aware of certain Second Circuit decisions  
8 that are not so much in favor of the charge, but I think if  
9 there's a predicate or a reason in the record to give it, we  
10 certainly do request it. We think it's a fairly common  
11 charge.

12 MR. BRAFMAN: Your Honor, can I just add that this  
13 is the rare case where there is no tape recording, there is  
14 no video recording, there are no emails that are head shots  
15 in my view. It's really a question of credibility of a lot  
16 of the witnesses who've been extensively cross examined.  
17 Some of them have admitted on the witness stand that at one  
18 point or another they did lie, for example, Mr. Yaffe.

19 Now, the government can say, well, he panicked and  
20 he had a motive to protect Mr. Shkreli. But to the extent  
21 that a witness has admitted to lying or has been shown to  
22 have lied in cross examination, for the jury not to  
23 understand that if they find that a witness lied about an  
24 issue, that they have the right, if they so choose, to  
25 disregard the witness' testimony or they could believe as

1 much of the testimony as they thought was credible and  
2 disregard the part which they found not to be credible.

3 I think most of the cases that I've seen who  
4 considered the issue said that they don't require it  
5 necessarily in every case, are cases that I think could be  
6 very distinguished from this case which relies, in large  
7 measure, on witness credibility. The government asked each  
8 witness on direct examination a series of questions, had you  
9 known, had you known, had you known. And then on cross it  
10 was clear that they could care less because they never read  
11 the memo or they relied on their lawyer or they relied on  
12 somebody who told them something about the defendant. So  
13 when witness credibility is really at the heart of the case,  
14 I think the charge is necessary, Your Honor.

15 MS. KASULIS: Your Honor, we believe that the  
16 Court's charge satisfies all of the concerns that the  
17 defense has. There is, in fact, the top of 21, statements  
18 about a willful falsehood always is a matter of importance  
19 and should be considered seriously. So we think that any  
20 concerns that the defense has is sufficiently addressed in  
21 the credibility of the witness charge as set forth in  
22 Section 11.

23 THE COURT: Well, I know that there is language  
24 that is sometimes used about you may decide whether to  
25 reject in total the witness' testimony or decide what

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1 portions of the testimony to accept as true and reject as  
2 false. I don't think we did put that specifically.

3 MR. BRAFMAN: You didn't put that in, but we would  
4 ask that it be added. I know it's referenced in some way,  
5 but I don't think the jury is clearly told what they can do  
6 with testimony that they find to be false. I think this  
7 helps the government as much as it helps us.

8 MS. KASULIS: And, Your Honor, I do think that the  
9 prior inconsistent statements section, Section 14, does  
10 address this issue about whether to discount a portion or  
11 all of testimony with respect to witnesses' credibility and  
12 so I think there is actually just a section that addresses  
13 this potential inconsistency of witness testimony issue.

14 THE COURT: I think also at page 20 we touch on  
15 this in the second full paragraph, second sentence,  
16 "Evidence of discrepancies may be a basis to disbelieve a  
17 witness' testimony. On the other hand, discrepancies in  
18 witnesses' testimony are between his or her testimony and  
19 that of others. Do not necessarily mean that the witness'  
20 entire testimony should be discredited. I mean, it does  
21 give the juror the clear message that it can be all or part.

22 MR. AGNIFILO: I think, respectfully, I think  
23 that's a little bit of a different issue, witness  
24 discrepancy. I mean, I think that the falsus in uno charge  
25 is really geared towards something different which is how

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1 does a -- what are the different ways that a jury could  
2 handle a situation where it comes to a conclusion that a  
3 witness misrepresented on a material subject.

4 And I think it's a subject -- I think it's a  
5 charge that arose because the jury could use the Court's  
6 guidance in that. They could -- and that's all the Court  
7 does. The Court certainly in the charge doesn't tell the  
8 jury what to do. It gives the jury the range of options.

9 THE COURT: We will add it.

10 MR. BRAFMAN: Okay.

11 THE COURT: We're going to look at it and we will  
12 put something in and hope we can put up a black line and  
13 suggestion and you can hopefully be satisfied.

14 MR. AGNIFILO: In that same section.

15 THE COURT: Charge 11?

16 MR. AGNIFILO: Yes. On page 19 there's that small  
17 paragraph, the small full paragraph before the end. It says  
18 "Evidence that a witness is bias, prejudice or hostile  
19 toward the defendant." I don't know that -- I think Your  
20 Honor basically touches on the same subject in the previous  
21 paragraph in maybe a more balanced fashion. I guess, I mean  
22 I'm not concerned about the charge because it talks about  
23 bias for or against the defendant so I guess it does add  
24 something new. But the balance of the charge seems -- the  
25 rest of the charge has some balance to it.

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1 THE COURT: So do you want it out? Is that the  
2 bottom line?

3 MR. AGNIFILO: No. Give me -- let me just -- give  
4 me one second.

5 THE COURT: Okay. I think if anything it helps.

6 MR. AGNIFILO: Yeah, I agree.

7 MR. BRAFMAN: We'll leave it in.

8 MR. AGNIFILO: I've been overruled, which is why I  
9 walked over.

10 THE COURT: All right. What else?

11 MR. AGNIFILO: Nothing else in that section.

12 THE COURT: Charge Twelve.

13 MR. AGNIFILO: We're good on Charge Twelve.

14 MS. KASULIS: Same for the government.

15 THE COURT: Charge Thirteen.

16 MR. AGNIFILO: My only concern with Charge  
17 Thirteen, I know it's a typical charge, but the only witness  
18 who testified who's a government witness was the FBI agent,  
19 and I certainly didn't do anything to attack his credibility  
20 as being biased for the government. And so I'm concerned  
21 that at the sentence in the middle of the page there on 13,  
22 it is common for defense counsel to try to attack the  
23 credibility of the witness employed by the government. I  
24 think had I done than, that would be relevant, but I think  
25 that everyone would agree that I didn't even come close to

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1 that.

2 THE COURT: I think that that was a placeholder  
3 that we put in, but I'll hear from Mr. Kasulis if she feels  
4 that you didn't attack his credibility.

5 MS. KASULIS: With respect to the summary charts,  
6 Your Honor, I do think that there was some cross examination  
7 about the way in which Agent Braconi prepared the charts and  
8 I anticipate there may be some argument in the summations  
9 regarding that issue, and so we believe that this  
10 instruction should be given to the jury.

11 (Continued on the following page.)  
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1 MR. AGNIFILO: If I could, I don't disagree with  
2 the characterization. I did challenge him on the chart. But  
3 I didn't challenge him because his testimony was colored by a  
4 personal or professional interest in the outcome of the case.  
5 I think that's what -- I would have asked him the same  
6 questions if he was an accountant.

7 THE COURT: I think you went there because you said,  
8 "How long have you been working on this case?" He said, Four  
9 years." Basically creating a sense that he does have a  
10 professional stake in the outcome.

11 MR. AGNIFILO: I certainly, I certainly -- I thought  
12 I was actually going in the other direction and I was trying  
13 to convey to the jury -- listen, I think that -- not just  
14 because he's standing behind me -- he is a responsible  
15 credible FBI agent and suggesting anything else to the jury is  
16 not in my interest. So I thought I could cross-examine him on  
17 the mere fact of how he made the chart, without suggesting,  
18 which I didn't even come close to, you made the chart this way  
19 because you're a Government employee, I didn't come close to  
20 doing that.

21 I guess the word "attack," that's really what got my  
22 attention, that I'm attacking the credibility. Sometimes I do  
23 attack the credibility of a few of the Government witnesses; I  
24 certainly didn't --

25 THE COURT: Should we say "question" the

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1 credibility.

2 MR. BRAFMAN: We questioned the fact that the chart  
3 didn't consider certain facts. It wasn't a witness who's had  
4 personal credibility in the eyes of the jury. It's a question  
5 of how he went about doing this. He admitted that he didn't  
6 consider Retrophin when he valued, when he prepared the  
7 charts. This wasn't a hostile cross.

8 MS. KASULIS: I think your Honor correctly noted  
9 that Mr. Agnifilo, whether it was his attention or not, did  
10 highlight the fact that Special Agent Braconi has been working  
11 on this case for over four years as one of the case agents.  
12 It's clear that they were attacking the way in which he  
13 prepared the charts. I'm sure we'll hear more on summation on  
14 Thursday and we think this is an appropriate instruction.

15 MR. AGNIFILO: Just to round out, I'm asking your  
16 Honor to remove the sentence. If your Honor doesn't want to  
17 remove the sentence, I ask that we take out "attack," because  
18 I think that has connotations that were very much inconsistent  
19 with my cross-examination. But if your Honor wants to put in  
20 "question" that would be okay.

21 THE COURT: We will opt for leaving it in and  
22 substituting the word "question" for "attack."

23 MR. AGNIFILO: Okay.

24 THE COURT: Charge 14?

25 MR. AGNIFILO: We're fine with 14.



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1 MS. KASULIS: Same for the Government.

2 THE COURT: Fifteen?

3 MR. AGNIFILO: Fine.

4 MS. KASULIS: Same.

5 THE COURT: Sixteen?

6 MR. AGNIFILO: Fine with 16.

7 MS. KASULIS: Same.

8 THE COURT: Seventeen?

9 MR. AGNIFILO: One second.

10 THE COURT: Did you remove Mr. Greebel's name from  
11 seven?

12 MR. SRINIVASAN: I think we did.

13 MS. KASULIS: We should look at that. That was with  
14 respect to Mr. Greebel's motion. We'll go back and confirm.

15 THE COURT: In terms of --

16 MS. KASULIS: Removing Mr. Greebel entirely from the  
17 Indictment.

18 THE COURT: Just paragraph seven which says,  
19 Mr. Shkreli together with Mr. Greebel and others were involved  
20 in this -- I have the language here, it was objectionable. I  
21 think the Government had conceded that it would be willing to  
22 remove it from the Indictment that would go to the jury.

23 MS. KASULIS: Yes, your Honor.

24 THE COURT: It reads that, "The defendant, Martin  
25 Shkreli, together with the defendant, Evan Greebel, and others

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1 orchestrated four interrelated fraud schemes." I think you  
2 were going to remove the words "with the defendant Evan  
3 Greebel and," those words.

4 MS. KASULIS: Yes, your Honor, we can go ahead and  
5 do that.

6 MR. AGNIFILO: On charge 17 considering only this  
7 defendant, I'm looking on page 26, it's the last paragraph.  
8 My concern is in a conspiracy, the charge is absolutely  
9 correct, that the jury is not being asked whether any other  
10 person has been proven guilty, but it seems to be somewhat  
11 inconsistent with the notion of a conspiracy. So maybe  
12 just --

13 THE COURT: Delete that first sentence?

14 MR. AGNIFILO: Yes, I think that will do it.

15 THE COURT: Okay. I think that's acceptable. We  
16 will delete the first sentence of the last paragraph of the  
17 charge in number 17.

18 Charge 18?

19 MR. AGNIFILO: Approximate dates is fine.

20 MS. KASULIS: Same.

21 THE COURT: Did my clerk be give you some proposed  
22 other charges regarding non-prosecution agreements? I think  
23 we were going to just, there is a charge for that and we  
24 weren't sure whether to put it in given that this did come up.  
25 I'll have my clerk give you the charge so we can have it and

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1 weigh in on it; A, whether it should be given at all; and B,  
2 whether you want proposed changes to it.

3 MR. AGNIFILO: One other thing on page 26, it might  
4 be rendered moot by the way we're changing the Indictment, it  
5 talks, maybe five lines down, on page 26, certain persons were  
6 named as co-conspirators but not indicted. I'm not sure if at  
7 the end of the day we're going to have people named as  
8 co-conspirators in the new Indictment.

9 MS. KASULIS: We will be calling them  
10 co-conspirators.

11 MR. AGNIFILO: Right. But it's what is in the  
12 Superseding Indictment.

13 THE COURT: What are you objecting to, sir?

14 MR. AGNIFILO: I'm objecting to this part here where  
15 it says, "or that certain persons were named as  
16 co-conspirators but not indicted." They can call people  
17 co-conspirators in summation, but naming them co-conspirators  
18 seems to refer to something in the Superseding Indictment. So  
19 my question was, the reason I'm jumping the gun a little bit,  
20 I don't know what the changed Superseding Indictment is going  
21 to look like at the end. If they still have people named as  
22 co-conspirators in the Indictment that's given to the jury,  
23 we're going to object to that. So if we're going to object to  
24 that, we object to this portion of the charge.

25 MS. KASULIS: So your Honor, I do believe in the

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1 Indictment we do when we substitute co-conspirator one, for  
2 example, we then do include the name of the individuals.

3 THE COURT: And you will identify those people as  
4 co-conspirators?

5 MS. KASULIS: I believe it's, conspired with certain  
6 individuals, so we believe this is appropriate.

7 THE COURT: It will be appropriate once you revise  
8 the Indictment.

9 MR. AGNIFILO: I'm not clear. You're going to say  
10 so Shkreli conspired with a person's name, Mulleady for  
11 instance?

12 MS. KASULIS: Correct. Do you want to take a look  
13 at the Indictment then we can revisit the issue?

14 MR. AGNIFILO: Let's do that. I might come back to  
15 this or I might not.

16 THE COURT: So I think the proposed instruction  
17 regarding non-prosecution agreement witnesses would fit here  
18 before we get into the charges.

19 MR. BRAFMAN: Yes. And we request that your Honor  
20 give -- we were handed a copy by your clerk, your Honor.

21 THE COURT: Okay.

22 MS. KASULIS: It's fine, your Honor.

23 THE COURT: We'll add that maybe at the end of this.

24 MR. BRAFMAN: What page would that be?

25 THE COURT: We'll probably call it Instruction 19 on

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1 page 27, at the end before we move on to the charges. Is that  
2 all right?

3 MR. AGNIFILO: That's fine, Judge.

4 THE COURT: Are we ready to move on to the charges?

5 MS. KASULIS: Yes.

6 MR. AGNIFILO: Yes.

7 THE COURT: Page 27, the introduction of the  
8 Superseding Indictment.

9 MR. AGNIFILO: I'm fine on 27.

10 MS. KASULIS: Same.

11 THE COURT: Page 28? Page 29?

12 MR. AGNIFILO: I was on 28, the first line of 28.

13 It says, "Shkreli was not charged with crimes," can it be  
14 "with acts"? I feel like crimes, there is a conclusion that  
15 these other things are in fact crimes.

16 THE COURT: Substitute the word "acts" for "crimes"?

17 MR. AGNIFILO: Yes, that's our request.

18 MS. KASULIS: Your Honor, could you give me one  
19 moment?

20 Your Honor, the only concern with doing that, it  
21 sounds like unless it is specifically listed in the Indictment  
22 that then they are not to consider any acts outside of the  
23 Indictment. There are, for example, overt acts or certain  
24 e-mails and statements made. So I'm a little concerned  
25 about -- your Honor's instruction is always about, he's not

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1 charged with a crime in connection with this or that. I'm  
2 concerned changing that to acts will give the impression to  
3 stay within the four corners of the Superseding Indictment in  
4 their consideration of the evidence.

5 MR. AGNIFILO: My concern only is that we don't  
6 really know that all these things are in fact crimes. Like  
7 for instance, there was, your Honor instructed the jury,  
8 Mr. Shkreli is not charged with, I think making  
9 misrepresentations or anything in regard to Merrill Lynch;  
10 that may be a crime, or may not be crime. I don't want the  
11 instruction to suggest that these different things that the  
12 Court asked them to consider are in fact crimes in the  
13 judgment of the Court which is why -- I understand the  
14 Government's concern. I'm trying to figure out a way of  
15 getting us both what we want.

16 MS. KASULIS: I think the sentence before it states,  
17 "You have heard evidence of other acts allegedly committed by  
18 the defendant when such evidence was introduced. And I  
19 instructed you that Mr. Shkreli was not charged with crimes  
20 not listed in the Superseding Indictment. So I mean that --

21 THE COURT: How about if I say, "When such evidence  
22 was introduced, I instructed that Mr. Shkreli was not charged  
23 or that those acts were not charged in the Indictment," or  
24 something like that.

25 MS. KASULIS: Not charged as separate crimes in the

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1 Indictment.

2 MR. AGNIFILO: How about this, how about, well, I  
3 guess we have to say what your Honor is doing here is you're  
4 reminding them of what you previously instructed them. So I'm  
5 trying to remember exactly what you said; that's really what  
6 you're doing here. I'm trying to remember how your Honor  
7 instructed them on those points.

8 THE COURT: I think the main point was to tell the  
9 jury that he's not charged with this in the Indictment, it's  
10 not charged conduct.

11 MR. AGNIFILO: Right, right.

12 THE COURT: With those acts, with such acts in the  
13 Superseding Indictment.

14 It says, "You have heard evidence of other acts  
15 allegedly committed by the defendant. When such evidence was  
16 introduced I instructed you that Mr. Shkreli was not charged  
17 in the Indictment."

18 MR. AGNIFILO: "With such acts."

19 THE COURT: "With such acts."

20 MR. AGNIFILO: That would seem to link the acts to  
21 the prior concept, which I think helps the Government with  
22 their concern.

23 MS. KASULIS: I think your Honor's instruction was  
24 with respect to crimes that they are not charged as separate  
25 crimes.

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1 THE COURT: Yes.

2 MS. KASULIS: I don't want to confuse the jury again  
3 to just exclude entirely a consideration of an admissible  
4 statement or evidence because --

5 THE COURT: I think what this tells the jury is,  
6 look, the crimes at issue here are the ones charged in the  
7 Indictment. And that's it. I did tell the jury that those  
8 particular acts were not charged in the Indictment, right?

9 MR. AGNIFILO: Right. But they could be not charged  
10 in the Indictment because they are not crimes. My concern is  
11 something from the Court that calls them crimes, because they  
12 may not be crimes. I think "such acts," I think "such acts"  
13 gets us where we need to be, because in context it makes  
14 sense.

15 You previously said, "You have heard evidence of  
16 other acts allegedly committed by the defendant. When such  
17 evidence was introduced I instructed you that Mr. Shkreli was  
18 not charged with such acts as crimes."

19 THE COURT: No, with such acts in the Superseding  
20 Indictment. I think that's enough.

21 MR. AGNIFILO: I think that's right. I think "such  
22 acts" makes it clear.

23 THE COURT: Is that all right? It will read, in  
24 relevant part, that "Mr. Shkreli was not charged with such  
25 acts in the Superseding Indictment."



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1 MR. AGNIFILO: That's fine.

2 MS. KASULIS: "With such acts in the Superseding  
3 Indictment."

4 THE COURT: It refers back to the prior sentence.

5 MS. KASULIS: Okay.

6 THE COURT: What else?

7 MR. AGNIFILO: Nothing else on 28.

8 THE COURT: Page 29?

9 MS. KASULIS: Just so we're clear, our next  
10 modification is on page 36.

11 THE COURT: What about you, Mr. Agnifilo?

12 MR. AGNIFILO: I don't have anything on 29. I don't  
13 have anything on 30. 31, no.

14 I have a lot of scribbling on 35, let me see if I  
15 can make sense of it. My first concern on page 35 under  
16 devise, scheme, or artifice to defraud. "A devise, scheme, or  
17 to defraud is merely a plan for the accomplishment of any  
18 objective." My concern with that is, we're not just talking  
19 about a devise, scheme, or artifice; we're talking about a  
20 devise, scheme, or artifice to defraud. What I'm proposing is  
21 a devise, scheme, or artifice to defraud is a plan to  
22 accomplish a fraud. Then you go on to define fraud.

23 THE COURT: Any objection, Ms. Kasulis?

24 MS. KASULIS: I think that's fine.

25 MR. AGNIFILO: Okay. Then the end of the last full

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1 paragraph, the last sentence of the last full paragraph. I  
2 tried put in an active voice, I'm hoping that I do it in a way  
3 that makes sense.

4 It starts with, "The concealment of material facts  
5 in a manner." So the way it reads now, "The concealment of  
6 material facts in a manner that makes what is said or  
7 represented deliberately misleading may also constitute false  
8 or fraudulent statements under the statute." My proposed  
9 change is, "You may also find an omission" -- wait one second.  
10 "You may also find an omission to be fraudulent if the  
11 omission is of a material fact, and if it causes what is said  
12 or represented to be deliberately misleading," I'm trying to  
13 put in an active sense. Because I'm concerned, I read it a  
14 few times. I think your Honor is being more faithful to the  
15 10(b)(5) statute with the way it's written. I think it's  
16 written in a passive voice. But I think it's awfully hard to  
17 follow.

18 MS. KASULIS: Your Honor, this is the standard  
19 instruction.

20 THE COURT: I'm a little concerned about veering too  
21 far from the statutory language. I suppose we could put the  
22 sentence structure, false or fraudulent statements under the  
23 statute include or may include the concealment of," blah,  
24 blah, blah. Does that work? That's a little more -- but I  
25 don't want to stray from the --

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1 MR. AGNIFILO: Because what the idea is obviously,  
2 it's a material concealment if it makes what is actually said  
3 or represented deliberately misleading. So as long as that is  
4 clear, I don't really care how we get there. I put in an  
5 active voice to bring that about. I do acknowledge that the  
6 way your Honor has it is more faithful to the way 10(b)(5) is  
7 actually written.

8 MS. KASULIS: Your Honor, we would like to maintain  
9 this language. I think it is most faithful to the statute.

10 THE COURT: God forbid I create more confusion among  
11 the jury. And it's already difficult to comprehend the  
12 statute, I think the least I stray the better.

13 MR. AGNIFILO: Yes.

14 THE COURT: We'll leave that as is.

15 What else, Counsel? I believe the Government had  
16 something on page 36?

17 MS. KASULIS: For page 36 just at the very bottom,  
18 your Honor, I think sale of "stock" should be sale of  
19 "securities."

20 THE COURT: You're right.

21 MR. AGNIFILO: That's fine.

22 THE COURT: Anything else? Page 37?

23 MR. AGNIFILO: On 37 all I have is second line from  
24 the bottom, rather than "once you find," "if you find."

25 THE COURT: Okay. What else?

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1 MR. AGNIFILO: Nothing else there. Thirty-eight,  
2 I'm okay.

3 MS. KASULIS: Me too.

4 THE COURT: Page 39?

5 MR. AGNIFILO: I'm okay on 39.

6 THE COURT: Forty?

7 MR. AGNIFILO: I'm okay on 40.

8 MS. KASULIS: Same.

9 THE COURT: Forty-one?

10 MR. AGNIFILO: Forty-one, my understanding of the no  
11 ultimate harm charge, let me back up.

12 So the *Rossomando* decision has the charge I think  
13 the way it's written here. Then after *Rossomando* there is  
14 *Berkovich*, it's not in front of me, but the case that follows.

15 THE COURT: *Berkovich*.

16 MR. BRAFMAN: And *Berkovich* says that, the Second  
17 Circuit in *Berkovich* said that the no ultimate harm charge was  
18 appropriate in *Berkovich* because the *Berkovich* iteration added  
19 certain things to the *Rossomando* iteration. What it added was  
20 two things. The first thing -- I'll let your Honor get there.

21 THE COURT: I have it. I'm looking at the case. Go  
22 ahead.

23 MR. AGNIFILO: Okay. So at the end of the second  
24 full paragraph your Honor has the sentence, "No amount of  
25 honest belief on the part of the defendant that the scheme

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1 ultimately will make a profit for the investors will excuse  
2 fraudulent actions or false representations by him." I think  
3 the language that **Berkovich** says that we should include after  
4 that is "to obtain money or property." The sentence would be,  
5 "will excuse fraudulent actions or false representations by  
6 him to obtain money or property."

7 MS. KASULIS: We're just looking at the case.

8 MR. SRINIVASAN: Your Honor, I'm looking at the  
9 **Finazzo** decision.

10 THE COURT: We have it in the **Finazzo** decision.

11 MR. SRINIVASAN: What the Court clarified, the no  
12 ultimate harm instruction was appropriate especially where the  
13 District Court clarified immediately after that the Government  
14 was still required to establish that the defendant engaged in  
15 an alleged fraudulent scheme for the purpose of causing some  
16 loss to another. And the Court, I think the Second Circuit,  
17 specifically approved that type of instruction. So I think  
18 that language --

19 THE COURT: Let's just focus on, you're looking at  
20 the decision at page 108?

21 MR. AGNIFILO: You're talking about **Finazzo**, Judge?

22 THE COURT: Yes. And the instruction, is that the  
23 one you're focusing on?

24 MR. SRINIVASAN: Yes, your Honor.

25 MR. AGNIFILO: I think what happened, I spent a lot

1 of time trying to figure this out. I think what happened in  
2 *Finazzo*, the defense counsel objected to the charge in toto.  
3 But what they didn't do in *Finazzo*, is bring the Court back to  
4 *Berkovich*. I think *Berkovich* is pretty clear, to say that  
5 this is the totality of the charge and what it should be and  
6 why it was upheld in *Berkovich*. So I think if the *Berkovich*  
7 charge is not in *Finazzo*, it's because I don't think the  
8 defense lawyer thought to tell the Judge, the Second Circuit  
9 in *Berkovich* has basically said that with the absence of this  
10 other additional language the charge is improper. Because  
11 that's my reading of the *Berkovich* decision.

12 The *Berkovich* decision, I think, takes some pains to  
13 say that the charge that was given by the trial Court in  
14 *Berkovich* is inappropriate charge because it added certain  
15 things that was not in the charge in *Rossomando*. I think in  
16 addition to whatever factual distinction there is between  
17 *Rossomando* and *Berkovich*, there is a distinction between the  
18 contents of the charge. I think the Second Circuit in  
19 *Berkovich* is pretty clear.

20 I think what Mr. Srinivasan's point is, some of the  
21 threads didn't necessarily continue to the present into  
22 *Finazzo*. But I think that is more because of the way the  
23 charge was litigated at the respective charge conference.  
24 There is no indication in the record that the defense lawyer  
25 in *Finazzo* wanted this additional language, the *Berkovich* type

1 language which we're specifically requesting. And I don't  
2 know of any Second Circuit decision since *Berkovich* that backs  
3 away from the propriety of the additional language. If I  
4 remember right, I think the Circuit italicizes the language in  
5 *Berkovich*. And says that is the difference between the charge  
6 in *Berkovich* and the charge in *Rossomando*.

7 THE COURT: The concept is about deprivation of  
8 money or property in the *Finazzo* case. The instruction, which  
9 is at page 108 says, "In order to prove a scheme to  
10 defraud" -- and this is regarding the wire fraud, "In order to  
11 prove a scheme to defraud, the Government must prove that the  
12 alleged scheme contemplated depriving another of money or  
13 property. Property includes intangible interest such as the  
14 right to control the use of one's assets. This interest is  
15 injured when a victim is deprived of potentially valuable  
16 economic information it would consider valuable in deciding  
17 how to use its assets. To act with intent to defraud, means  
18 to act knowingly and with a specific intent to deceive for the  
19 purpose of causing some financial or property loss to  
20 another."

21 Then the Circuit says, "These instructions are  
22 consistent with our prior decisions and therefore not  
23 erroneous." They do propose, I guess in one of these  
24 footnotes, an alternative instruction that might not -- well,  
25 I won't comment on whether I think it's a good one.

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1 MR. SRINIVASAN: Your Honor, if we could make a  
2 proposal I think on page 69 of your charge, this is another  
3 iteration of the no ultimate harm instruction. Sorry, page  
4 70. "I reiterate, however, that an intent to defraud for  
5 purposes of the wire fraud statute means to act knowingly and  
6 with specific intent to deceive with the purpose of financial  
7 loss or property loss to another." I think putting that back  
8 on page 41.

9 THE COURT: Okay. So I'll copy that and just put it  
10 on page 41. It will just say an intent to defraud, okay?

11 MR. AGNIFILO: I'm sorry?

12 THE COURT: So on page 70, at the bottom of the  
13 first partial paragraph, the last sentence, it starts with, "I  
14 reiterate however." What we'll do is copy this and will  
15 state, "An intent to defraud for the purpose of the wire fraud  
16 statute means," et cetera, that will copied and pasted into  
17 the instruction on page 41. Right?

18 MR. AGNIFILO: I understand what your Honor is  
19 doing, I'm trying to compare that language.

20 My concern is I'm reading from the *Berkovich* case,  
21 where the Court specifically cites this portion of the  
22 instruction. The instruction in the *Berkovich* case  
23 specifically includes the language "to obtain money or  
24 property" after the sentence "no amount of honest belief on  
25 the part of the defendant that the scheme ultimately will make



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1 a profit for the investors will excuse fraudulent actions or  
2 false representations by him," that's not where the charge in  
3 **Berkovich** ends, because it goes on to say, "to obtain money or  
4 property."

5 So our request in regard to page 41, is that your  
6 Honor use the charge in **Berkovich** exactly as it was in  
7 **Berkovich**. And there is two different places, so this is the  
8 first place where the Court's charges proposed doesn't fully  
9 reflect the charge given in **Berkovich**.

10 MS. KASULIS: Your Honor, I think **Finazzo** again  
11 post-dates this case and makes clear if your Honor inserts the  
12 language that we discussed after this section that it  
13 satisfies the most recent Second Circuit precedent regarding  
14 this no ultimate harm charge.

15 MR. AGNIFILO: **Finazzo** is not a published decision.  
16 There is nothing that is cut back. I think **Berkovich** is clear  
17 as a bell. It's specifically says, the decision of **Berkovich**  
18 specifically says --

19 THE COURT: My clerk points out that **Berkovich** was a  
20 mail fraud case. The money or property language may be  
21 necessary for mail and wire fraud, but what this charge is  
22 addressed to is securities fraud, which does not require  
23 intent to cause loss under **U.S. Versus Litvak**. Which is, I  
24 think, why we did talk about this distinction and why we  
25 didn't put it in. Unless you think it's a different --

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1 MR. AGNIFILO: I, I quite frankly hadn't thought of  
2 the distinction between securities fraud and mail fraud until  
3 you brought it up.

4 THE COURT: You want to think about it for five  
5 minutes?

6 MR. AGNIFILO: Not a bad idea.

7 THE COURT: Do you want us to print the *Litvak* case  
8 for you? Let's take five minutes and you'll think about it.  
9 All right, that's fine, five minutes.

10 MR. BRAFMAN: Your Honor, Mr. Agnifilo is handling  
11 the part of the charge. I feel comfortable asking your Honor  
12 if I could be excused, and Mr. Shkreli has asked to come with  
13 me, we have issues to discuss. He will waive his appearance  
14 with matters related to the charge, and tomorrow you can  
15 indicate on the record that we've reviewed it with him and  
16 that he feels comfortable, if you wish. But there would be no  
17 issue. He has been excused with me. It has a lot to do with  
18 respect to the summation.

19 THE COURT: All right. Well, I'm happy to grant  
20 your joint request to be excused.

21 As you know, Mr. Shkreli, you have a right to be  
22 here. It is often times the case the defendants don't come to  
23 the charging conference. And so absolutely you have the right  
24 to be here. You also have the right to be excused with your  
25 lawyer and prepare for tomorrow if you wish.

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1 Have a nice day. I'll see you at nine.

2 MR. BRAFMAN: Thank you very much, your Honor.

3 (Whereupon, Mr. Brafman and Mr. Shkreli were

4 Excused.)

5 MR. AGNIFILO: What we're trying to do, I think your  
6 Honor, and the clerk made a good point, how the no ultimate  
7 harm charge would apply to a crime that has no loss as an  
8 element. We're trying to go through the Second Circuit  
9 decisions that liken to securities fraud, how it is handled.  
10 United States V. Lange 834 F3d 58 from 2016, we have the added  
11 benefit that AUSA Smith tried it. So the decision doesn't  
12 give us enough information of how the charge was worded.  
13 We're trying to pull up.

14 MS. KASULIS: We're trying to pull up the actual  
15 jury instruction.

16 MR. AGNIFILO: I think part of the issue there was  
17 securities fraud and wire fraud, but we also have that here.

18 THE COURT: But the instructions I'm sure were given  
19 for each separate count, right?

20 MS. KASULIS: That's what we're pulling up.

21 (Continued on next page.)  
22  
23  
24  
25

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1 THE COURT: This issue was whether Mr. Haywood was  
2 an employee of Retrophin, and we had seen something that was  
3 signed by an individual as comptroller of Retrophin, but it  
4 was not Mr. Haywood. It was Mr. Harrison.

5 MR. AGNIFILO: Okay.

6 THE COURT: So I wanted to be corrected. But  
7 nonetheless, my ruling would remain the same.

8 MR. AGNIFILO: That's fine. Thank you, Judge.

9 And just for the record, since we're on the  
10 record, we -- I think both parties are fine with this  
11 additional instructions, proposed instruction regarding  
12 Defendant's duty, if any, to disclose settlements and  
13 consult the opinions to the board.

14 THE COURT: All right. And that will be inserted  
15 in instruction for Count 7 for the conspiracy to commit wire  
16 fraud.

17 MS. KASULIS: Yes.

18 MR. AGNIFILO: Okay.

19 THE COURT: All right. Were there any  
20 modifications to the language or were you all --

21 MR. AGNIFILO: It seems fine with us.

22 MS. KASULIS: No, Your Honor, I think we're both  
23 in agreement.

24 THE COURT: So have you straightened out your  
25 issues with regarding the conspiracy the commit securities

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1 fraud?

2 MR. AGNIFILO: Well, here's -- all right. There  
3 are a few issues that I think are all combining around the  
4 no ultimate harm charge. Your Honor gives the charge twice,  
5 and Your Honor gives the charge twice, I think, because you  
6 give it once in the securities fraud context and you give it  
7 once in the wire fraud context.

8 THE COURT: Yes.

9 MR. AGNIFILO: I think Your Honor and your staff  
10 make a very good point in the securities fraud context, and  
11 quite frankly, I haven't considered that. And I'm still  
12 trying to think through as to whether the no ultimate harm  
13 charge has to necessarily be reflective of the elements of  
14 the crime, but putting that aside, in -- and I know I'm  
15 jumping the gun by going to Page 70, but it all comes  
16 together in the charge.

17 The no ultimate harm charge, I think, in the wire  
18 fraud context, it's my position is within a purview of the  
19 **Berkovich** decision, and that added language in the **Berkovich**  
20 decision. So while I think the Court makes a good point,  
21 that wire fraud -- because wire fraud involves the  
22 contemplated deprivation of property, whereas securities  
23 fraud does not, I think the no ultimate harm charge in the  
24 wire fraud context should contain the additional language,  
25 by him to obtain money or property. And then at the end of

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1 the case paragraph -- and I know I'm jumping -- I'm jumping  
2 around -- for the purpose of causing some loss...

3 So then -- and I don't know what Your Honor's  
4 going to do with that. My concern is that we might have two  
5 somewhat different no ultimate harm charges, one -- and  
6 maybe that's okay.

7 MS. KASULIS: I think --

8 THE COURT: I think we have to --

9 MS. KASULIS: Yeah.

10 THE COURT: -- because it's a terminal statute --

11 MR. AGNIFILO: Yeah, yeah.

12 THE COURT: -- in the wire.

13 We can tweak the no ultimate harm charge with  
14 regard to the wire fraud conspiracy, Count 7, but I think  
15 that's where it is.

16 MS. KASULIS: And, Your Honor, with respect to the  
17 way in which Your Honor charged the no ultimate harm, he --  
18 with respect to the wire fraud charge in *Finazzo*, it does  
19 cite *Berkovich*. And Your Honor's current reiteration of the  
20 no ultimate harm instruction is consistent with the way in  
21 which the Court charged this instruction in *Finazzo*. And so  
22 we think this is the correct reiteration of this  
23 instruction. And again, it addresses Mr. Agnifilo's concern  
24 about making sure that it's looping back to the purpose as  
25 to cause financial loss or property loss to another.

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1           And so we think that the way in which Your Honor  
2           has instructed with respect to the wire fraud charge  
3           regarding the good faith instruction is the most consistent  
4           with recent Second Circuit precedent that does, in fact,  
5           cite back to the case that Mr. Agnifilo is relying on from  
6           1999.

7           MR. AGNIFILO: My concern is twofold. One I  
8           don't -- I don't know what the defense attorney's  
9           specifically asked for in *Finazzo*. I don't know that they  
10          specifically asked for what I'm sort of referring to as the  
11          *Berkovich* language.

12          I do know, and I don't know what significance this  
13          has *Finazzo* is not a published decision, it's a thoughtful  
14          decision by the Second Circuit, certainly, not a published  
15          decision.

16          And my concern also with *Berkovich* is -- and I'm  
17          just going to read off Page 67.

18          THE COURT: May I just ask you a for direct  
19          question?

20          MR. AGNIFILO: Okay.

21          THE COURT: What is it about the instruction on  
22          Page 70 that doesn't capture what you want, which is the  
23          intent to cause financial loss or property to another.

24          Why is that not in your view sufficient?

25          MR. AGNIFILO: Let me -- it's a very good and very

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1 direct question. Let me see if I can give a good and direct  
2 answer. Okay. The reason I think it doesn't capture it, is  
3 because -- it comes close. But here's, I think, what the  
4 distinction is: The distinction seems to be -- and I'm  
5 really not doing anything that Court I think in **Berkovich**  
6 didn't do already is to say that baked into the concept,  
7 part of the very concept of sort of the no ultimate harm  
8 instruction, at least in the wire fraud context, is the very  
9 notion that the false representation must be part -- related  
10 to obtaining money or property, which is why they actually  
11 added to the instruction. Not a different instruction but  
12 an actual continuation of the sentence.

13 And I think that's significant.

14 And then what Your Honor doesn't have on Page 70  
15 which Your Honor does have on Page 41 is that second  
16 paragraph where it talks as a practical matter; Your Honor  
17 does have it on Page 41 -- let me just double-check. I'm  
18 pretty sure you do.

19 THE COURT: I do.

20 MR. AGNIFILO: Yeah, so the way it reads in  
21 **Berkovich** and I'll read the whole thing: As a practical  
22 matter, then, in order to sustain the charges against the  
23 defendant, the Government must establish beyond a reasonable  
24 doubt that he knew that his conduct as a participant in the  
25 scheme was calculated to deceive and nonetheless he



1 associated himself with the alleged fraudulent scheme for  
2 the purpose of causing some loss to another.

3 So that's the whole charge in **Berkovich**. And what  
4 **Berkovich** says and I'm quoting **Berkovich** now on Page 67,  
5 Unlike **Rossomando**, the instruction here clearly informed the  
6 jury that they could not convict appellant unless he  
7 intended to cause loss to someone. That this instruction  
8 immediately followed the no ultimate harm language also  
9 reduces the impact of that language. And then they go on to  
10 say, The possibility of confusion that troubled us in --  
11 that troubled us in **Rossomando** was therefore greatly reduced  
12 by this proper restatement of the law.

13 Now I don't know that in the series of no ultimate  
14 harm cases that's changed since **Berkovich** that the issue  
15 would necessarily press. I mean so, for instance, in the  
16 **Finazzo** decision I don't see any reference in the decision  
17 that the defense attorney asked for this **Berkovich** language  
18 and was denied. It sounds like -- what people tend to do is  
19 to object to the no ultimate harm charge as an improper  
20 charge. And by this point it seems pretty clear that the  
21 Second Circuit has deemed it to be a proper charge given it  
22 and okayed it in a number of cases.

23 I do note -- I don't think any other circuit's  
24 ever given or endorsed the no ultimate harm charge, at least  
25 I checked, I couldn't find the no ultimate harm charge in

1 any other circuit.

2 That being the case, we're in the Second Circuit  
3 and the Second Circuit seems pretty firm that it is an  
4 appropriate charge.

5 So I think what happened in the *Finazzo* case is  
6 the defense attorney is probably so concerned with trying to  
7 keep the whole charge out, which I don't really have a good  
8 faith argument to do in the Second Circuit, quite frankly,  
9 that they weren't necessarily as concerned with the actual  
10 iteration of the charge.

11 So I don't know that *Finazzo* somehow repudiates or  
12 supersedes or disposes with *Berkovich*. I think *Berkovich* is  
13 still the law of the circuit. So that's my -- that's my...

14 THE COURT: You say it's unrecorded decision,  
15 *Finazzo*.

16 MR. AGNIFILO: I didn't have it as a recorded  
17 decision. It may be recorded since then.

18 MS. KASULIS: Yeah, it was.

19 THE COURT: One is more like a summary order but  
20 the decision we've been relying on was reported 850 F.3d 94.

21 MR. AGNIFILO: Then I stand corrected. When I  
22 checked in out on *Westlaw* I couldn't find a reported -- it  
23 reported.

24 THE COURT CLERK: That is not reported. The  
25 decision you referring to for *Berkovich* I believe is

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1 unreported. There are two different sections.

2 MS. KASULIS: Got it.

3 MR. AGNIFILO: Okay.

4 MS. KASULIS: Got it.

5 MR. AGNIFILO: All right. So just by way of  
6 clarification, just so I understand what I'm saying, so  
7 there's a reported decision and unreported decision but the  
8 unreported decision is the one that refers to **Berkovich**.  
9 Okay. That's the way I understand it. Thank you.

10 THE COURT: The other distinction, I think, in  
11 Count 7 we have a conspiracy to commit wire fraud whereas  
12 **Berkovich** was a substantive wire fraud count. So it is a  
13 different charge for a substantive charge and --

14 MR. AGNIFILO: Well, but --

15 THE COURT: Well, because the Government does not  
16 have to prove beyond a reasonable doubt every element of the  
17 underlying substantive charge. What they have to prove is  
18 conspiracy to commit wire fraud is the agreement to, you  
19 know, the elements for the conspiracy.

20 MR. AGNIFILO: But in a -- in a wire fraud  
21 conspiracy there still has to be conspiracy that property  
22 be -- if -- if -- if there's no agreement that property be  
23 taken, I don't believe that would be conspiracy either. I  
24 think that for conspiracy to commit wire fraud there has to  
25 be an agreement going in that property is wrongfully, you

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1 know, taken from someone. So I don't know that that ends up  
2 changing the no ultimate harm analysis.

3 I mean, we strongly ask the Court for the language  
4 in **Berkovich**, especially in regard to the wire fraud  
5 iteration of the charge. I think it's -- I think it's the  
6 appropriate language. I think in **Berkovich** the  
7 Second Circuit is really being pretty explicit.

8 THE COURT: If I understand you correctly what you  
9 would like is for the last paragraph of 41 to be copied and  
10 pasted into the charge that is at Page 70 with the words  
11 added at the end of the sentence For the purpose of causing  
12 loss to another, right?

13 MR. AGNIFILO: So it's in two places. So on  
14 Page 41 at the end of the paragraph here, where it says The  
15 investors will -- I'm sorry, Investors will excuse  
16 fraudulent actions or false representations made by him to  
17 obtain money or property.

18 MS. KASULIS: That's for security fraud.

19 MR. AGNIFILO: No, no, no that's right.

20 THE COURT: What --

21 MR. AGNIFILO: The question is the whole -- the  
22 whole -- what I'm asking for **Berkovich** I understand that  
23 the -- the Government wants it different for securities  
24 fraud and I understand why they do.

25 But what I think I'm understanding from Your Honor

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1 is that it might be easier than -- let me give the whole  
2 concept and then we can figure out where it goes.

3 So have that **Berkovich** language at the end of that  
4 paragraph which is to obtain money or property, and then the  
5 second paragraph be as a practical matter paragraph ends  
6 with For the purpose of causing some loss to another. I  
7 mean that's language in **Berkovich**. Yes, it literally is a  
8 wire fraud case. But that is our position as what's the  
9 proper no ultimate harm charge is.

10 Certainly in a wire fraud case and --

11 THE COURT: But you're importing into a securities  
12 fraud case an element that is not required under  
13 Second Circuit law.

14 MR. AGNIFILO: Well, then I think what the answer  
15 could be is that Your Honor has two no ultimate harm  
16 charges. You have one in the security context.

17 THE COURT: It says --

18 MR. AGNIFILO: That would not have the added  
19 **Berkovich** language.

20 THE COURT: Right. That's what I was proposing.

21 MR. AGNIFILO: Okay.

22 THE COURT: The way I was proposing that you  
23 read --

24 MR. AGNIFILO: Uh-huh.

25 THE COURT: -- **Berkovich** at Page 41 --

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1 MR. AGNIFILO: Yep.

2 THE COURT: -- the last paragraph that starts As a  
3 practical matter, that is what you read from *Berkovich* with  
4 the additional language at the sentence For the purpose of  
5 causes loss to another, that will be transposed into the  
6 charge for the conspiracy to commit wire fraud on Page 70 --

7 MR. AGNIFILO: Okay.

8 THE COURT: -- with the added, you know, For the  
9 purpose of causing loss to another or for the purpose of  
10 obtaining money or property, whatever you prefer.

11 But that last paragraph will be copied and pasted.  
12 All right?

13 MR. AGNIFILO: Right.

14 Okay.

15 THE COURT: So does that make sense?

16 MR. AGNIFILO: It does.

17 MS. KASULIS: Yeah.

18 MR. AGNIFILO: So now we're on Page 70.

19 MS. KASULIS: Page 70.

20 MR. AGNIFILO: So what Your Honor is going to have  
21 on Page 70, a third of the way down, it's going to say, Make  
22 a profit for investors will excuse fraudulent actions or  
23 false representations caused by him to obtain money or  
24 property.

25 THE COURT: Well, if you want it there, that's

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1 fine.

2 MR. AGNIFILO: I think that's where it would go.

3 MS. KASULIS: Is that the only issue?

4 THE COURT: Is that all you want?

5 MR. AGNIFILO: No, no, no that's one more thing.

6 THE COURT: Okay.

7 MR. AGNIFILO: I promise I'll get it.

8 THE COURT: That's all right. I will hold your  
9 promise, but okay.

10 MR. AGNIFILO: Okay. I think what *Berkovich* is  
11 saying is that it has to then be followed by that same As a  
12 practical matter paragraph that Your Honor has on Page 41,  
13 which we don't have on Page 70.

14 MS. KASULIS: And can you read what paragraph  
15 you're talking about?

16 MR. AGNIFILO: Sure. So now I'm reading from 41  
17 As a practical matter then to prove the charge against the  
18 defendant the Government must establish beyond a reasonable  
19 doubt that the defendant knew that his conduct as a  
20 participant in the scheme was calculated to deceive and  
21 nonetheless he associated himself with the alleged  
22 fraudulent scheme.

23 Now that's the way it reads on Page 41.

24 And I'll accept that in the securities fraud  
25 context for the reasons we've discussed.

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1 In the wire fraud context, you're going to want  
2 the additional language in **Berkovich** that ends that  
3 paragraph and I'll read what my proposal was With the  
4 alleged fraudulent scheme for the purpose of causing some  
5 loss to another.

6 And I'm getting that verbatim out of the **Berkovich**  
7 decision. And that would only be on Page 70 and not on 41.

8 MS. KASULIS: Well, Your Honor, one of issues is  
9 that it's also saying that we have to establish that beyond  
10 a reasonable doubt and Your Honor correctly noted that in  
11 the wire fraud context, this is a conspiracy charge. So we  
12 do not have to prove that beyond a reasonable doubt. I  
13 mean, Your Honor, again with respect to the language that  
14 Your Honor has included, the language that was both upheld  
15 in **Lange** recently and in **Finazzo** and I think it ain't broke.  
16 I don't know why we're sort of trying to fix it to make it  
17 inconsistent with what the recent Second Circuit law says is  
18 a completely appropriate charge.

19 I'm just getting a little worried that we're  
20 starting the sort of cobble something together that is not  
21 really consistent at this point with recent Second Circuit  
22 law.

23 MR. AGNIFILO: I -- I've not seen a case that cuts  
24 back on **Berkovich** and --

25 MS. KASULIS: Well, it's cited to **Berkovich**.



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1 MR. AGNIFILO: And certainly not where a defense  
2 attorney is specifically requesting this language.

3 MS. KASULIS: And *Lange* also cites to *Berkovich*.  
4 And with respect -- I mean, Mr. Agnifilo is speculating as  
5 to what the attorneys in *Finazzo* did and did not argue. In  
6 that case, I can represent was a highly litigated case, both  
7 with respect to depravation of money and property.

8 So I don't know, you know, again, I think it is  
9 wholly speculative to say this issue was not focused on or  
10 discussed as part of the litigation.

11 MR. AGNIFILO: I'm only talking about what I'm  
12 reading in the decision, obviously.

13 THE COURT: Well, rather than include the language  
14 about the Government having to prove beyond a reasonable  
15 doubt the wire fraud, you know, if we are going to insert  
16 some form of this into the conspiracy to commit wire fraud  
17 count in Count 7, I think we can probably use language from  
18 Page 41, which is from *Berkovich*, The defendant knew that  
19 his conduct as a participant in the scheme was calculated to  
20 deceive and nonetheless he associated himself with the  
21 alleged fraudulent scheme for the purpose of causing loss to  
22 another. That part of the paragraph can be put into the  
23 instruction for Count 7 without the language that the  
24 Government must prove beyond a reasonable doubt that is so,  
25 right?

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1 So...

2 MR. AGNIFILO: But you're going to keep it in the  
3 count on Page 41?

4 THE COURT: Yes.

5 MR. AGNIFILO: All right. That's fine.

6 THE COURT: We'll figure something out to just put  
7 that language in and run it by you.

8 MR. AGNIFILO: Okay.

9 THE COURT: All right. Could we just go back to  
10 where we left off? You said you also worked out other  
11 issues, I think you said. We were on Page 41.

12 MS. KASULIS: Uh-huh.

13 THE COURT: And I would like to hear whether  
14 there's anything beyond Page 41 in addition to what we  
15 discussed.

16 MS. KASULIS: On Page 43 I think it's just a  
17 typographical error.

18 THE COURT: Uh-huh, sure.

19 MS. KASULIS: It's an easy one. In the first full  
20 paragraph starting, It is not necessary.

21 THE COURT: Yes.

22 MS. KASULIS: It says that a defendant be directly  
23 or personally involved in any e-mailing wire or use. I  
24 think this is supposed to be mailing wire or use because  
25 it's the securities fraud. I think it's just a typo because

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1 the sentence before does make references to e-mail but it  
2 also makes reference to mails or --

3 THE COURT: Oh.

4 MR. AGNIFILO: Okay. That's fine just change  
5 e-mails to mails.

6 MS. KASULIS: Yes.

7 THE COURT: Okay. Anything else on Page 43?

8 MR. AGNIFILO: No.

9 THE COURT: Page 44.

10 MR. AGNIFILO: No.

11 THE COURT: Page 45.

12 MR. AGNIFILO: No.

13 THE COURT: 46.

14 MR. AGNIFILO: No.

15 THE COURT: 47.

16 MR. AGNIFILO: No.

17 MS. KASULIS: And, again, Your Honor, we will

18 provide a dated list of overt affects with the

19 co-conspirators and investor names inserted.

20 THE COURT: Do you think that could come today?

21 MS. KASULIS: Yes.

22 MR. AGNIFILO: That would apply to 48, 49, 50.

23 MS. KASULIS: Yes.

24 MR. AGNIFILO: And 51. And other than that I have

25 nothing else on any of those pages.

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1 MS. KASULIS: Same.

2 THE COURT: Okay. Good.

3 Starting with Page 52, conspiracy.

4 MR. AGNIFILO: I do have something, let me see if  
5 I'm -- if I can make sense of it. What I have here on the  
6 top of Page 52.

7 THE COURT: Yes.

8 MR. AGNIFILO: -- at the end of the second line.

9 THE COURT: Yes.

10 MR. AGNIFILO: My proposed added language is  
11 However, you must find beyond a reasonable doubt that the  
12 defendant conspired with one or more others to do so. I  
13 will now charge you on the law of conspiracy.

14 And the reason I'm requesting that is because the  
15 whole sentence starts on 51 it says, For Count 1 and the  
16 Government need not prove that the defendant actually  
17 committed securities fraud. The unlawful acts charged as  
18 the objects of the conspiracy in Counts 1 and 4.

19 And then I feel like there should be some intro as  
20 to why Your Honor's about to read conspiracy. And so that's  
21 my proposed language, that you basic -- Your Honor basically  
22 have, you know, this statement showing, A, that conspiracy  
23 is a charged crime, so it has elements that have to be  
24 proven beyond a reasonable doubt and that Your Honor  
25 introduce the concept of conspiracy with this as sort of the

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1 jumping off point from the entire section.

2 THE COURT: Any objection, Ms. Kasulis?

3 MS. KASULIS: Can you just read it again.

4 MR. AGNIFILO: Sure, sure.

5 MS. KASULIS: Can I just read it?

6 MR. AGNIFILO: Sure, you can.

7 MS. KASULIS: I'm more of a visual.

8 MR. AGNIFILO: Yeah, go ahead.

9 I changed you to defendant.

10 MS. KASULIS: Yeah, that's fine, Your Honor.

11 MR. AGNIFILO: Do you want it again, Your Honor.

12 THE COURT: However you must mind beyond a  
13 reasonable doubt.

14 MR. AGNIFILO: That the defendant conspired with  
15 one or more others to do so. I will now charge you on the  
16 law of the conspiracy.

17 MS. KASULIS: I just wanting to make sure the to  
18 do still makes sense.

19 THE COURT: Yeah, to do so.

20 MS. KASULIS: Yeah, yeah.

21 THE COURT: I think you said something else  
22 earlier.

23 MS. KASULIS: For counts --

24 THE COURT: Oh, no, maybe you didn't.

25 MS. KASULIS: ...to commit a securities fraud.

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1 MR. AGNIFILO: We can put something -- let me  
2 think.

3 (Pause in proceedings.)

4 THE COURT: All right. I got it.

5 MS. KASULIS: Okay.

6 THE COURT: However, you must find beyond a  
7 reasonable doubt that defendant conspired with one or more  
8 individuals --

9 MS. KASULIS: Uh-huh.

10 MR. AGNIFILO: That's fine.

11 THE COURT: -- to commit securities fraud.

12 MR. AGNIFILO: That's good.

13 MS. KASULIS: Yeah, that's fine.

14 THE COURT: And then you wanted to put the  
15 introductory language, I will now instruct you on  
16 conspiracy.

17 MR. AGNIFILO: If Your Honor wants. I'm not  
18 married to it. If Your Honor wants to do it, that's fine.

19 MS. KASULIS: That's fine.

20 THE COURT: I tell you what is awkward we have  
21 these headings but I don't really necessarily read them  
22 but --

23 MR. AGNIFILO: Right.

24 THE COURT: -- I try to, okay now I'm going to  
25 tell you about whatever.

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1 MR. AGNIFILO: Right.

2 THE COURT: That's fine.

3 We'll add that little introductory sentence.

4 All right. What else do we have after Page 52,  
5 please.

6 MR. AGNIFILO: 53, small thing where it says  
7 First --

8 THE COURT: Yes.

9 MR. AGNIFILO: -- that two or more persons enter  
10 into an agreement to commit securities fraud, as I have  
11 defined the term to you, just because you haven't defined  
12 the crime in a while, just to remind them that that's a  
13 crime that has been defined for them by the Court.

14 MS. KASULIS: That's fine.

15 THE COURT: We want to give a reference to the  
16 page?

17 MS. KASULIS: Uh-huh.

18 MR. AGNIFILO: Sure.

19 MS. KASULIS: Yeah, the jury's going to get the  
20 instruction.

21 MR. AGNIFILO: Yeah; is that right.

22 THE COURT: All right.

23 What else?

24 MR. AGNIFILO: I don't have anything on 54.

25 THE COURT: Just maybe flip simultaneously on your

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1 next.

2 MS. KASULIS: 55's fine.

3 MR. AGNIFILO: 55's fine.

4 MS. KASULIS: My next issue to raise is Page 59.

5 MR. AGNIFILO: Okay. I'm good until then, too.

6 THE COURT: Okay. Ms. Kasulis.

7 MS. KASULIS: With respect, Your Honor, to the  
8 paragraph starting In some --

9 THE COURT: Yes.

10 MS. KASULIS: -- I just think that for the  
11 Government must prove beyond a reasonable doubt, I think  
12 Number 1 should just circle back to the two or more people  
13 entered into an agreement because it presupposes the  
14 agreement. I think we're just missing that there was an  
15 agreement, entered into an agreement to commit securities  
16 fraud.

17 THE COURT: Well, also the defendant has to enter  
18 into the agreement not two or more.

19 MS. KASULIS: Oh, I'm sorry.

20 THE COURT: Yes.

21 MS. KASULIS: Yes.

22 THE COURT: That the defendant entered an  
23 agreement with another person.

24 MS. KASULIS: Right or one or more individuals to  
25 commit securities fraud. And I think that circles back to



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1 Your Honor's listing of the prior elements.

2 THE COURT: So then would we strike out The  
3 purpose of the conspiracy is to commit securities fraud?

4 MS. KASULIS: Right.

5 THE COURT: I think that kind of captures it.

6 MS. KASULIS: Right.

7 THE COURT: Okay.

8 MR. AGNIFILO: That's fine.

9 THE COURT: All right. What else?

10 MS. KASULIS: My next proposal is for Page 60,  
11 Your Honor. I think that the -- in our proposed instruction  
12 on venue for securities fraud conspiracy, I think the  
13 sentence about The overt act does not have to be an overt  
14 act that is charged in the superseding indictment in  
15 furtherance of the conspiracy was eliminated from this  
16 section from our proposed charges. I think that was  
17 recently -- I mean that was affirmed in **Lange** that -- that  
18 language.

19 THE COURT: Okay. Where would you like to insert  
20 it?

21 MS. KASULIS: I think it was right after the  
22 suffix.

23 THE COURT: All right.

24 MR. AGNIFILO: What --

25 MS. KASULIS: The overt act does not have to be in

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1 furtherance of the conspiracy.

2 MR. AGNIFILO: Okay.

3 THE COURT: So may I have you read it back again,  
4 Ms. Kasulis.

5 MS. KASULIS: Your Honor, I think that this  
6 section that should be included is "The overt act does not  
7 have to be an overt act that is charged in the superseding  
8 indictment in furtherance of the conspiracy."

9 (Pause in proceedings.)

10 MS. KASULIS: Just to be clear I think the  
11 language is on Page 26. I actually rewrote this because I  
12 think it's not as clear as it could be. The way it's  
13 currently written, "The overt act does not have to be an  
14 overt act in furtherance of the conspiracy that is specified  
15 in the indictment." That is specified in the indictment  
16 perhaps maybe read to modify the conspiracy instead of the  
17 overt act.

18 And so we went ahead and checked in *Lange* and we  
19 can hand this up to Your Honor. The Government is not  
20 restricted to the overt act charged in the indictment in  
21 justifying its choice of venue.

22 So the language that we proposed The overt act  
23 does not have to be an overt act that is charged -- I'm  
24 sorry.

25 THE COURT: In the indictment in furtherance of

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1 the conspiracy?

2 MS. KASULIS: Right. That's exactly right. I  
3 think that more captures and minimizes confusion about that  
4 insert.

5 MR. AGNIFILO: Which one?

6 MS. KASULIS: *Lange*.

7 (Pause in proceedings.)

8 MR. AGNIFILO: That sounds like a correct  
9 statement, Your Honor.

10 THE COURT: Okay, good.

11 We've got: The overt act does not have to be an  
12 overt act that is charged in the indictment in furtherance  
13 of the conspiracy.

14 MS. KASULIS: Right. And I think we've been  
15 defining it as the superseding.

16 THE COURT: Superseding.

17 MS. KASULIS: Uh-huh.

18 THE COURT: Right we have.

19 And that will follow to word "suffix," correct?

20 MS. KASULIS: Correct.

21 THE COURT: All right. What's next?

22 MS. KASULIS: My next was on Page 64.

23 THE COURT: Yes.

24 MS. KASULIS: Your Honor, just for language at the  
25 top the third and fourth overt act element, it makes it

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1 sound like there are first and second overt act elements, so  
2 perhaps we can just strike third and fourth.

3 THE COURT: Okay.

4 MS. KASULIS: And just leave the overt act element  
5 on which I instructed you with respect to Counts 1 and 4..

6 THE COURT: Okay.

7 MR. AGNIFILO: That's fine.

8 MS. KASULIS: Do not apply.

9 THE COURT: Okay. Thank you.  
10 What else?

11 MR. AGNIFILO: Nothing.

12 MS. KASULIS: My next is Page 66.

13 THE COURT: Okay.

14 MS. KASULIS: Are you done?

15 MR. AGNIFILO: Yeah, sure.

16 MS. KASULIS: Okay. On Page 66 in the first  
17 paragraph listed there at the end of the sentence starting  
18 The scheme to defraud giving rise to the wire fraud  
19 conspiracy charges in Counts 2 and 5 are alleged to have  
20 been carried out by making false representations and  
21 omissions.

22 THE COURT: Okay.

23 MS. KASULIS: We would like to add that language.

24 THE COURT: All right. I think you look troubled.  
25 Do you want to see the superseding indictment and see if

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1 that's accurate?

2 MR. AGNIFILO: That, and also I know Your Honor  
3 already defined for the jury when omissions can be  
4 actionable. When -- when the utility of asking for -- would  
5 Your Honor consider them as saying false representations or  
6 omissions -- I'm trying to think of an artful way of putting  
7 it.

8 The concept that I'm trying to get at, Your Honor  
9 already told -- because omissions by themselves are not  
10 equivalent of statements. So I'm trying to, without too  
11 many words, have the Court remind the jury of that since it  
12 probably would have been an hour since they've heard what --  
13 when an omission can be an actionable event. I'm trying to  
14 think of a way of putting it. Do you want omissions right  
15 after representations.

16 MS. KASULIS: Uh-huh, uh-huh, that's fine.

17 THE COURT: This is for the wire fraud?

18 MS. KASULIS: Uh-huh.

19 THE COURT: Go back and see what we said.

20 MS. KASULIS: Your Honor, we do charge it as  
21 misrepresentation, material misrepresentation and omissions  
22 in the indictment.

23 THE COURT: So do you want to just say by making  
24 material misrepresentations?

25 MS. KASULIS: Misrepresentations, we can do that.

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1 THE COURT: Or omissions?

2 MS. KASULIS: Uh-huh.

3 THE COURT: I want to capture the concept of the  
4 omissions being fraudulent or material if.

5 MR. AGNIFILO: In the other Court's false  
6 statement and omissions section on Page 35. The false  
7 statements and omission section is on Page 35.

8 (Continued on next page.)

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1 THE COURT: How about we say, "or omissions and  
2 material facts in a manner that makes" -- it becomes very  
3 long -- "what is said deliberately misleading."

4 MR. AGNIFILO: I think that's our request. Since it  
5 would have been such a long time since they heard your Honor's  
6 definition of omission, that's our request. If you're going  
7 to put omissions in.

8 MS. KASULIS: It's language mirroring page 35?

9 THE COURT: Yes.

10 MR. AGNIFILO: That's fine.

11 MS. KASULIS: So we would say "false  
12 representations."

13 THE COURT: "Or omissions of material fact."

14 MS. KASULIS: "In a manner that makes what is said  
15 or represented deliberately misleading."

16 MR. AGNIFILO: Yes, that's good.

17 THE COURT: Yes. What else do we have?

18 MR. AGNIFILO: Nothing else on page 66.

19 MS. KASULIS: I'm sorry, your Honor, I'm just  
20 thinking through this omissions issue for a second.

21 I think we can, Mr. Srinivasan is going to check one  
22 thing for me, but we can keep going.

23 So we've been proceeding under a money theory, this  
24 is page 67, People's side are proposing to strike in the  
25 second paragraph starting with the sentence "property," all

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1 the way to the end because we've been arguing a deprivation of  
2 money per the investor statements. We went ahead and made  
3 sure we pulled sidebars and looked at it. This language has  
4 to do with intangible property rights, inside information and  
5 things along that line. To make sure we're appeal-proof, we'd  
6 like to strike the sentence beginning "property" all the way  
7 to the bottom. I think Mr. Agnifilo is in agreement.

8 MR. AGNIFILO: Yes.

9 THE COURT: So the preceding sentence will end with  
10 the "depriving with another money."

11 MS. KASULIS: "Or property," is fine. We can take  
12 out the next section, that has to do with intangible property  
13 rights, which we've not proceeded under that theory.

14 THE COURT: We'll strike the rest of the paragraph  
15 down to footnote three.

16 MS. KASULIS: Correct.

17 MR. AGNIFILO: Correct.

18 MS. KASULIS: My next one is page 79.

19 THE COURT: Did you have something else before page  
20 79, Mr. Agnifilo?

21 MR. AGNIFILO: Let me check. I have nothing before  
22 79.

23 MS. KASULIS: It has to do with Count Eight, your  
24 Honor, starting on page 75. Count Eight charges that  
25 securities fraud conspiracy in relation to the Fearnow shares.



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1 We realize that in reviewing the jury instructions last night  
2 that we should include some language regarding to capture the  
3 concept of market manipulation or use of shares to effect the  
4 trading or price of stock. So we have a proposed an insert  
5 which tracks the language in Royer, that I can hand up to your  
6 Honor, and obviously can let counsel for the defense have an  
7 opportunity to consider. It's a short insert. Royer, 549 F3d  
8 886, Second Circuit case from 2008. I can also hand this up  
9 to your Honor. It would be after the third prong of the first  
10 element of securities fraud, that's on page 79.

11 THE COURT: At the end of the sentence.

12 MS. KASULIS: Right, after prong three.

13 I can hand up this case, your Honor, as well.

14 MR. AGNIFILO: It seems like it's an accurate  
15 statement of the law.

16 MS. KASULIS: He tried not to --

17 MR. AGNIFILO: It's it seems sort of dense.

18 MS. KASULIS: Your Honor, this was the language that  
19 we were proposing, I can hand this up to the Court.

20 You can ignore my circumstantial evidence umbrella  
21 at the top.

22 THE COURT: I appreciate having it. You did hand  
23 this up.

24 MS. KASULIS: I'm sorry.

25 THE COURT: Do you think we need the language

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1 regarding this third alternative prong of the first element of  
2 securities fraud? Could we just start the sentence with, "Any  
3 conduct," after the end of the sentence the third element,  
4 would that work?

5 MS. KASULIS: That's fine with the Government, your  
6 Honor. Right after prong three, your Honor, would it be just  
7 a paragraph insert or would it just follow on?

8 THE COURT: Well, what I was going to suggest, since  
9 we're saying first, second, third, at the end of that sentence  
10 it says, "mails in furtherance of the fraudulent conduct,"  
11 period. And then we would start the sentence, "Any conduct  
12 that is designed to deceive or defraud investors by  
13 controlling," et cetera.

14 MS. KASULIS: We could do that.

15 THE COURT: Just because I think when we start  
16 saying to the jury third alternative prong, it may be  
17 confusing to them. Does that work for you, Mr. Agnifilo?

18 MR. AGNIFILO: I can't think of a better way to do  
19 it. The Government is right, this is a true statement of the  
20 law. I have no objection.

21 THE COURT: What else do we have?

22 MS. KASULIS: Your Honor, so my our last issue with  
23 the proposed jury instructions is in the defense section on  
24 page 80. I think we're doing this sort of reiteration of good  
25 faith that's been captured in two other places in the jury

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1 instructions, and we would like an inclusion of the no  
2 ultimate harm reference here as well, if we had it in two  
3 other places to include it here in addition.

4 MR. AGNIFILO: I don't think we need it a third  
5 time.

6 THE COURT: Can you just point it out then?

7 MR. AGNIFILO: The good faith?

8 THE COURT: Since it's mentioned in the other two  
9 instances.

10 MS. KASULIS: We can eliminate it entirely. If we  
11 mention it with the good faith instruction in the other two  
12 places, we mention it in the third. So either eliminate it  
13 entirely, it's already in the instructions; or include the no  
14 ultimate harm reference here as well.

15 MR. AGNIFILO: I want the good faith in the defense  
16 section. I don't want your Honor have a section on defenses  
17 and not have it there. We have reliance on counsel, they go  
18 together. And they both are sort of hallmarks of the defense.

19 My request is that we have the good faith section as  
20 a defense on its own, without the no ultimate harm, which has  
21 been given two separate times. I don't think that would work  
22 in unfairness on the Government. The Court has already linked  
23 good faith to no ultimate harm specific to the actual charge,  
24 and different based on counts. By this point the jury would  
25 have heard two no ultimate harm charges, them being slightly

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1 different from each one; one is in a securities fraud context,  
2 one is a wire fraud context. Giving it a third time is  
3 unnecessary.

4 MS. KASULIS: Your Honor, we feel very strongly  
5 about this. I think this is going to be one of the most sort  
6 of heated issues of this case. So if we are going to mention  
7 good faith, again, we feel strongly.

8 THE COURT: Which iteration will we get?

9 MS. KASULIS: That's the issue or concern.

10 THE COURT: Do you want to work together or you can  
11 come up with it because we do have two different iterations of  
12 it, depending on whether it relates to the wire fraud or  
13 securities fraud.

14 MR. AGNIFILO: I can tell we're going to want the  
15 Berkovich wire fraud iteration, if it's going to be here in --

16 MS. KASULIS: Can you say, with respect to wire  
17 fraud conspiracy I instruct you with respect to no ultimate  
18 harm, and with respect to securities fraud and securities  
19 fraud conspiracy or reverse them because one is sort of a  
20 little bit more than the other. But again, we feel very  
21 strongly it should be included here if we're going to include  
22 the good faith section in the defense.

23 MR. AGNIFILO: I think to have two different  
24 iterations -- the good faith charge is meant to be, and it's  
25 here as an across the board charge. To cut back on good

1 faith, the defense of good faith, based on the specific charge  
2 that the jury is considering the good faith in regard to, I  
3 think waters down the good faith defense. I mean, by this  
4 point the jury has heard the no ultimate harm charge twice.

5 I feel like we're entitled to have a section of our  
6 defenses that is our defenses. We're not talking about a lot  
7 of verbiage. We're talking about a total of two-and-a-half  
8 pages of defenses and I think that we get to have our defenses  
9 as our defenses.

10 It doesn't do prejudice to the Government. The jury  
11 would have heard the no ultimate harm charge twice already. I  
12 think we get to have -- certainly there is page upon page of  
13 the Indictment -- sorry, of your Honor's charges where you're  
14 referencing the Indictment, the Indictment alleges this. I  
15 haven't counted them all between I don't know six and 11 pages  
16 of the Court reminding the jury what is in the Indictment.  
17 And I think we're entitled to have a defense section that is  
18 our defenses. I think that's fair. I think it's balanced in  
19 regard to everything. And we feel strongly that we want a  
20 good faith section as our defense. By this point the no  
21 ultimate harm charge has been given twice. We are very happy  
22 with this charge as it is.

23 MS. KASULIS: I understand why Mr. Agnifilo is  
24 taking the position that he's taking. But we've also had a  
25 good faith instruction twice. I think if you're going to have

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1 another iteration of good faith, it should be complete, it  
2 should be balanced and incapsulate all of the law on the  
3 issue. We feel very strongly, your Honor, if you're going to  
4 have this section that there should be a no ultimate harm  
5 addition that most accurately reflects the law with respect to  
6 good faith.

7 MR. AGNIFILO: But the law has been reflected. The  
8 law has been reflected based on the charges. There is no,  
9 there is nothing about the good faith charge that requires the  
10 no ultimate harm charge, especially when the no ultimate harm  
11 charge has been given twice.

12 I think that the Government gets to have the Court  
13 tell the jury about the Indictment at great length. I think  
14 that we get to also have the Court tell the jury the defense  
15 has defenses in the exact way that we hope to put them in  
16 front of the jury. I don't think we should have our good  
17 faith defense --

18 THE COURT: Diluted.

19 MR. AGNIFILO: Yes, diluted, by an ultimate harm  
20 charge in the defense section.

21 MS. KASULIS: Your Honor, I think this is  
22 prejudicial to the Government. I do think again this is the  
23 central issue of this case in many ways. To have the third  
24 iteration of good faith as a defense with no caveating or  
25 reference to any ultimate harm, it's not an accurate

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1 expression of the law. I don't want the jury, if they are  
2 going to get the law to flip to defenses and see it doesn't  
3 talk about no ultimate harm, and therefore, that doesn't  
4 apply. I think it's very misleading to have it listed in this  
5 way.

6 MR. AGNIFILO: One other thing I'll point out.  
7 While your Honor mentions good faith previously, it's not set  
8 forth in the way that it's set forth here as the actual  
9 defense.

10 THE COURT: Right. I agree. I do think they are  
11 entitled to have their defenses set forth. We could just  
12 refer them back to the page or something or the concept.

13 "The jury however is reminded," or, "The Court  
14 reiterates that, as provided in on page blank with regard to  
15 the instruction regarding conspiracy to commit wire fraud or  
16 conspiracy to commit securities fraud," and add it. I think  
17 this is something that you two ought to come to some agreement  
18 on.

19 MR. AGNIFILO: I would love to. I think that as dug  
20 in as they are, we are as dug in.

21 THE COURT: I know. But let's just talk about it.  
22 I think the only issue is whether you get it all by itself or  
23 whether we give the balanced charge that we have previously.

24 MR. AGNIFILO: Let me see. Because your Honor had a  
25 thought that I was curious in seeing to conclusion.

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1 THE COURT: I was just thinking that we could maybe  
2 refer the jurors back, "Please be reminded that as set forth,"  
3 or, "as you were instructed with the conspiracy to commit wire  
4 fraud or conspiracy to commit securities fraud," and then  
5 state what it was, maybe give page references since it's both  
6 the good faith and the -- I just --

7 MS. KASULIS: It does say here it's a complete  
8 defense. We want to make sure it's balanced. We're fine with  
9 your Honor's proposal to refer the jury back to the no  
10 ultimate harm language.

11 THE COURT: It can be as minimal as possible. Maybe  
12 what Ms. Kasulis should do is propose some minimal reminder  
13 language back and drawing the description between the wire  
14 fraud and securities fraud, because otherwise you'll have it  
15 said twice in response to their good faith defense which would  
16 not be fair to them.

17 MS. KASULIS: So we'll propose language to insert in  
18 that section, your Honor.

19 THE COURT: What are we going to do about the next  
20 defense, reliance on counsel?

21 MS. KASULIS: I think we were fine.

22 MR. AGNIFILO: We're fine with it.

23 THE COURT: Okay.

24 MS. KASULIS: I think that's it for us.

25 MR. AGNIFILO: That's it for us too.



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1 THE COURT: What about the verdict sheet, folks?

2 MS. KASULIS: The verdict sheet was fine with the  
3 Government.

4 THE COURT: Why was the Finazzo verdict sheet done  
5 the way it was?

6 MS. KASULIS: It's a very good question, your Honor.  
7 I think because some of these issue were up on appeal before  
8 the Circuit at the time.

9 THE COURT: I see.

10 MS. KASULIS: I think the law has been settled on  
11 one issue since that time.

12 MR. AGNIFILO: We're fine with the verdict sheet.

13 THE COURT: Okay.

14 MS. KASULIS: So we will go back and circulate the  
15 revised proposed Indictment, the overt act inserts for the  
16 Indictment, and then the proposed language to add to the good  
17 faith defense.

18 MR. AGNIFILO: My understanding, the good faith  
19 defense is just going to be a reference back, we're not going  
20 to have new language.

21 MS. KASULIS: New language in drafting a reference  
22 back. We're going to try to keep it streamlined.

23 MR. AGNIFILO: That's fine.

24 THE COURT: So are you all going to be wanting to  
25 fight about this more before me before I make my decision? I

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1 would like to just decide it. It makes it logistically  
2 difficult to try to --

3 MR. AGNIFILO: Let's try do it now.

4 MS. KASULIS: Take ten minutes?

5 THE COURT: Do you want to call me when we're ready?

6 MR. AGNIFILO: Yes.

7 MS. KASULIS: Yes.

8 (Lunch recess taken.)

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1           A F T E R N O O N     S E S S I O N

2           (In open court; outside the presence of the jury.)

3           THE COURT: Counsel has conferred, and they have  
4 reached what I think is a good compromise to add additional  
5 language to the defense of good faith that is set forth in  
6 the instructions under the section entitled Defenses. And  
7 let's figure out where this will be inserted. At the end of  
8 the second paragraph on Page 80, under the good faith  
9 defense we will add the following language: "As a reminder,  
10 I instruct you that when considering the defense of good  
11 faith, that you consider it in conjunction with the  
12 instructions regarding the defendant's belief that  
13 ultimately everything would work out so that no one would  
14 lose money.

15           And we will refer the jurors back to Pages 41 and  
16 70 of the instructions.

17           MS. KASULIS: Your Honor, there was actually just  
18 one more issue.

19           THE COURT: Okay.

20           MS. KASULIS: With respect to Page 66, when we  
21 wanted to add "making false representations," we wanted to  
22 add "and omissions." I think because now where -- the  
23 omissions referring back -- I think we want to just actually  
24 return to the original language.

25           THE COURT: Okay.

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1 MS. KASULIS: Because that's defined later, the  
2 omission speech. So we are fine by leaving it as "carried  
3 out by making false representations," on Page 66.

4 MR. AGNIFILO: And that's fine with us,  
5 Your Honor.

6 THE COURT: Not "material representations"?

7 MS. KASULIS: I think "false representations" is  
8 fine Your Honor. Just as Your Honor had it is fine with the  
9 Government.

10 THE COURT: I think my clerk wanted to just flag  
11 something. He was going to do some additional research to  
12 make sure that certain of your -- the proposals were  
13 consistent --

14 MS. KASULIS: Okay.

15 THE COURT: -- with the law.

16 MS. KASULIS: Okay.

17 COURTROOM CLERK: That was actually one of them.

18 THE COURT: Is one. Okay.

19 MS. KASULIS: Yeah.

20 THE COURT: Yes, the omission addition --

21 MS. KASULIS: Yeah, but I think if we return to  
22 the original language then I think we're fine on that piece.

23 THE COURT: All right. Great.

24 So I just wanted to make sure that everybody is  
25 aware of the need not to stray beyond the evidence.

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1 MS. KASULIS: Uh-huh.

2 THE COURT: I am a little concerned that there may  
3 be arguments regarding matters that are not really in  
4 evidence. For example, I do not know whether Mr. Brafman is  
5 going to be arguing that Mr. Shkreli suffers from some sort  
6 of spectrum disorder or some sort of --

7 MR. AGNIFILO: I think --

8 THE COURT: -- autism, which I think would be  
9 inappropriate.

10 MR. AGNIFILO: I think he's going to stick to what  
11 is in -- what I think is in the record. I think  
12 Mr. Richardson said that Mr. Shkreli suffers from  
13 depression.

14 THE COURT: Yes, and anxiety.

15 MR. AGNIFILO: So I think he's going to be pretty  
16 faithful --

17 MS. KASULIS: Okay.

18 MR. AGNIFILO: -- to the record.

19 THE COURT: Okay.

20 MR. AGNIFILO: But I will advise him that  
21 Your Honor raised the issue.

22 THE COURT: Right. Because as we know the  
23 doctor -- was it Rosenfeld?

24 MS. KASULIS: Uh-huh.

25 THE COURT: -- he would not --

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1 MR. AGNIFILO: He wouldn't --

2 THE COURT: -- go there.

3 MR. AGNIFILO: He wouldn't go there, no.

4 MS. KASULIS: No.

5 THE COURT: And I thought that you might be  
6 presenting evidence from a mental health provider that he  
7 did have some sort of spectrum disorder, because it was  
8 really talked about so much in the opening. But I just want  
9 to make sure that that does not repeat itself --

10 MR. AGNIFILO: No, no --

11 THE COURT: -- because it really is not  
12 appropriate.

13 MR. AGNIFILO: No. I think he is going to stick  
14 to the evidence.

15 THE COURT: Okay. All right.

16 MR. AGNIFILO: One thing just to round out one  
17 issue. On the no ultimate harm charge --

18 THE COURT: Right.

19 MR. AGNIFILO: -- I know it's a recognized charge  
20 in the Second Circuit, and Your Honor's absolutely following  
21 Second Circuit law in giving it, and I don't have any good  
22 faith argument to the contrary. I don't know how this issue  
23 would ever be raised in future matters, but it is our  
24 position that -- for what it's worth -- that the  
25 Second Circuit is wrong on the no ultimate harm charge; that

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1 there were concerns that were raised in the earlier cases  
2 like *Rossomando* and whatnot, that the no ultimate harm  
3 charge arose to establish good faith charge is our position.

4 And that I think we're also mindful of the fact  
5 that in my research, no other circuit gives the charge. So  
6 there's no doubt Your Honor is following establish -- well  
7 established, repeatedly establish Second Circuit law. It's  
8 our position, though, that with all respect to the  
9 Second Circuit that they're not right on this issue.

10 I don't know what value there is in putting that  
11 on the record, but now it's on the record.

12 THE COURT: Well, maybe somebody can seek the  
13 juror instruction before the Supreme Court and get some  
14 clarification.

15 MR. AGNIFILO: Thank you, Judge.

16 THE COURT: But I think we are going to follow --

17 MR. AGNIFILO: Yes.

18 THE COURT: -- the Second Circuit at this point.

19 MR. AGNIFILO: Yes.

20 THE COURT: And the Supreme Court.

21 MR. AGNIFILO: Thank you, Judge.

22 THE COURT: All right. So is that it?

23 MS. KASULIS: Yes, Your Honor.

24 THE COURT: What we will do is we will try to post  
25 our edit before close of business today.

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1 MS. KASULIS: And we'll go right back right now,  
2 and the overt act piece --

3 THE COURT: All right.

4 MS. KASULIS: -- we will go ahead and circulate  
5 the word "movement" both with the proposed superseding  
6 indictment with the modifications that we have all discussed  
7 in the overt act to put into the jury instructions.

8 MR. AGNIFILO: Thank you.

9 THE COURT: All right. Great.

10 MS. KASULIS: Thank you.

11 MR. AGNIFILO: Take care everybody.

12 THE COURT: Thank you. See you tomorrow.

13 (Matter adjourned until Thursday, July 27, 2017 at  
14 9:00 a.m.)

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